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"the Judiciary," Subcommittee on Criminal
Justice.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

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HEARINGS BEFORE THE SUBCOMMITTEE ON CRIMINAL JUSTICE OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES NINETY-FIFTH CONGRESS FIRST SESSION ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

FEBRUARY 23, 24, AND MARCH 2, 1977

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

WEDNESDAY, FEBRUARY 23, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 2237, Rayburn House Office Building, Hon. James R. Mann [chairman of the subcommittee] presiding.

Present: Representatives Mann, Holtzman, Hall, Gudger, Evans, Wiggins, and Hyde.

Also present: Thomas W. Hutchison, counsel; Robert A. Lembo, assistant counsel; and Raymond V. Smietanka, associate counsel.

Mr. MANN. The subcommittee will come to order.

As the first order of business, the subcommittee has been asked to permit coverage of this hearing by means of motion picture or television photography.

In accordance with the committee rule of procedure V(a), permission to do so will be granted unless there is objection.

Is there any objection to such permission being granted?

Hearing no objection, such coverage is permitted, subject to the conditions set forth in rule V(a).

The Subcommittee on Criminal Justice today begins a study of several proposed amendments to the Federal Rules of Criminal Procedure.

The amendments involved affect rule 6(c), relating to the grand jury; rule 23, relating to jury trials; rule 24(b), relating to peremptory challenges to jurors; a new rule, 40.1, relating to removal of criminal cases from State to Federal courts; and rule 41(c) relating to issuance of search warrants upon the basis of testimony taken by a magistrate from someone not in his presence.

These amendments, which were promulgated by the Supreme Court last April, were to have taken effect on August 1, 1976, but their effective date was postponed to August 1, 1977, by Public Law 94-349. The purpose for delaying the effective date of the amendments was to give Congress adequate time in which to study them.

Today's hearing marks the start of the congressional study contemplated by Public Law 94-349. During this and the other hearings we will hold, we will hear from both proponents and opponents of the proposed amendments.

Our witnesses today include a Federal district judge, the Acting Deputy Attorney General, a representative of a national organization, and attorneys in private practice.

The subcommittee faces a serious time deadline. Since the proposed amendments will take effect next August 1, the subcommittee must act expeditiously if it wants to make changes in them. As a practical matter, in order to give the Senate sufficient time to act, any legislation changing the proposed amendments should be through the House no later than the end of April.

With our time constraints in mind, the subcommittee has scheduled a total of three hearings on the proposed amendments. The other two are set for February 24 and March 2. Markup will begin on March 3 and, hopefully, conclude on March 9. If the subcommittee decides that legislation would be appropriate, this schedule ought to give us enough time to get a bill through the House by the end of April.

Before calling the first witness, does any other member of the subcommittee desire to make an opening statement?

Mr. HYDE. No. Thank you.

Mr. MANN. Mr. Hall? Mr. Gudger?

If not, our first witness is Mr. Jay Schulman. Mr. Schulman is coordinator of the National Jury Project and will testify on behalf of that organization. He is the coeditor of a manual entitled "The Jury System: New Techniques for Reducing Prejudice." His testimony will concern itself primarily with the proposed amendment to rule 24(b), which involves peremptory challenges to prospective jurors.

I am glad to welcome you here today. Mr. Schulman, and without objection, your prepared statement will be made a part of the record. You may proceed as you wish with reference to your testimony.

Mr. SCHULMAN. I have not, Mr. Chairman, had a chance to submit my statement. I hope I can do that in a day or so.

Mr. MANN. Very well it will be made a part of the record when it is received.

TESTIMONY OF JAY SCHULMAN, COORDINATOR, NATIONAL JURY PROJECT

Mr. SCHULMAN. My name is Jay Schulman. I am a sociologist and a founder of the National Jury Project. I have been qualified as an expert on the jury system in many Federal courts.

The National Jury Project is a not-for-profit corporation chartered in New York State.

The focus of our work is the application of social science techniques to the strengthening of elements in the American jury system.

Since the beginning of its work in 1970, project members have worked on over 40 Federal trials involving both white and nonwhite defendants in more than 30 Federal court divisions.

Although much of our work has involved highly publicized trials, we have studied the composition of a number of Federal jury systems and have had considerable experience in the conduct of voir dire and the exercise of peremptory challenges in everyday Federal criminal practice.

I am here to speak in opposition to the proposed amendment to rule 24(b).

The overriding issue before this subcommittee and the Congress is whether the proposed changes in rule 24(b) are compatible with the sixth amendment right of the accused to an impartial jury trial, or whether the changes recommended will have the effect of eviscerating that constitutional right.

The subcommittee surely knows that the eclipse of *voir dire* and the trivialization of *voir dire* in most Federal courts have virtually extinguished the cause of challenge as a tool for minimizing jury partiality.

The accused has been left only with the peremptory challenges allowed under rule 24 to minimize the prejudice that so easily attaches to criminal defendants in these times of great public sensitivity to crime.

The Judicial Conference is proposing two very basic changes in rule 24(b).

First, they would reduce the absolute number of peremptory challenges available to both sides in all Federal criminal jury trials to 12 challenges in capital cases, nine challenges in felony cases and two challenges in misdemeanors.

These challenges would not enable the defendant to achieve a jury free of bias against the accused.

Findings from 28 surveys conducted by the jury project in 25 Federal divisions show that at least 30 percent of the members of Federal jury pools believe that an indictment, any indictment, is tantamount to guilt. They believe the accused is guilty and must prove his innocence.

In felony cases at present when the Arizona plan, the so-called "struck system" is used, the final panel contains 28 prospective jurors, eight of whom might fall into that category which assumes guilty *a priori*.

The defense with 10 challenges is thus able to weed out those jurors who are prejudiced. Under the proposed rule amendment the defense would have only five challenges to winnow a panel of 22, and yet a panel of 22 might well contain as many as 6.6 potential jurors who cannot grant the presupposition of innocence to the accused.

The predicament of the defense is compounded in those cases in which the criminal pretrial events have received extensive media coverage.

What is true in felony cases is even more true in death penalty cases, in which the charge alone arouses fear, loathing, anger and desire for retribution in a sizable portion of the community.

The plain fact is that 12 peremptory challenges in a capital case and five in felony cases are too few to afford the accused even the appearance of justice.

The effect will be an even higher conviction rate accompanied by an increased alienation from the criminal justice system.

The second change proposed by the Judicial Conference would provide parity in respect to peremptory challenges to the government and to the defendant in all Federal criminal cases.

The question is whether the interests of justice, for the public as well as the accused, is served by pretending that the Government suffers as much a priori prejudice as does the accused.

Certainly both the Government and the accused have an equal right to a fair and impartial jury.

Certainly, both the U.S. attorney and the defense attorney must be able to eliminate jurors either prejudiced for or against their side.

But how much problem does the Government actually face in minimizing prejudice against it?

Our studies of major felony and capital cases reveal that no more than 5 percent of a jury pool, even in a post-Watergate era, begins service with animosity against the Government or with a favorable view of even the most attractive criminal defendant.

Thus in a felony case under the present rule with a panel of 28, the Government needs only 1.4 or 2 challenges to remove those presumed to be biased against them.

Under the proposed rule amendment, with a panel of 22, the Government would need only one challenge to protect its right to a fair and impartial trial.

In a capital case under the present rule with a panel of 52, the Government needs but 2.6 or 3 challenges to be reasonably protected from partiality.

Under the proposed rule with a panel of 36, the Government would need but 1.8 or 2 challenges to be reasonably immune.

Suppose that our data understates by a factor of 2 or even 3, the animosity that attaches to the Government in criminal cases. Applying the same formula, the Government will still have a surplus of strikes in all criminal cases under both sets of rules.

Parity for the Government, combined with a loss of half of its peremptory challenges, leaves the defense with too few challenges to screen out jurors it would like to strike.

The Government, on the other hand, is left in the advantaged position of having more than enough strikes to eliminate all of those jurors it cares to.

The proposed changes in rule 24(b) vitiates rights of the accused which have been anchored in American jurisprudence for almost 200 years in capital cases and for 65 years in felony cases. The 1790 Crimes Act gave the accused 20 peremptory challenges and a favorable ratio of 4 to 1 over the Government in capital cases, while the 1911 Crimes Act accorded the accused 10 challenges and a disparity of 10 to 5 in felony cases.

Surely, the burden of justifying these far-reaching changes would seem to be on the Judicial Conference and its adherents. The Conference began its efforts to change rule 24(b) as long ago as 1960. In 1962 the Conference promulgated and disseminated a draft of the identical rule changes it is seeking to have adopted in 1977. The Conference abandoned the attempt to take these changes forward because of the strong opposition encountered from the legal community.

What has happened in recent years to persuade the Conference to try again with these proposals? The Conference's answers in the published notes is that the congressional passage of the 1968 Jury Selection Act has lessened the need for peremptory challenges. The Conference implied that a large number of peremptory challenges, 20 in

capital cases and 10 for the accused in felony cases, is contradictory to the spirit of Congress in passing the 1968 Jury Selection Act which based Federal jury service on a random selection from lists of registered voters in a judicial district. But legislative history of the 1968 Jury Selection Act does not show that Congress linked the creation of a more representative jury system to a reduction in peremptory challenges.

The Conference obviously believes that a representative jury system, mirroring its underlying civic population, lessens the need for peremptory challenges. However, prejudice is just likely to operate among jurors originating from a broad community cross-section as among jurors who were selected more narrowly. A more representative jury selection does not mean prejudice-free jurors and does not obviate the need for peremptory challenges. The Conference hypothesizes that fewer peremptory challenges for both sides will lead to greater representation on petit juries of subgroups which have been underrepresented or excluded because of the exercise of peremptory challenges. I assume that the Conference has nonwhite people in mind.

There are two issues here. First, are there so few nonwhites appearing in venues in many Federal divisions that either side can use its strikes to limit or exclude nonwhites from participation on Federal juries? Second, does one side or the other, or both sides, concentrate their strikes against nonwhite juror candidates?

In Federal divisions in which nonwhites comprise less than 20 percent of the registered voters, it is an easy matter for either side to exclude nonwhites as a matter of trial strategy. Trial experience, and in several reported Federal cases, showed that defense counsel tend to accept nonwhite jurors in most criminal cases, whereas prosecutors seem to strike nonwhite jurors consistently, particularly in cases where nonwhites are defendants.

For example, the United States struck all nonwhites who made it to the final panel or jury box in 10 recent jury trials in which Indians were defendants. The United States struck 81 percent of the blacks eligible to serve in 15 trials held in the Western District of Missouri in which the defendants were black. In the Hartford Division of the Connecticut District, the United States struck 94 percent of the black potential jurors in seven trials in which blacks were defendants, whereas defense counsel struck no blacks. In the same division the United States struck 90 percent of the blacks in 16 trials in which whites were defendants, whereas defense counsel struck 8 percent of the blacks.

To be sure, the fact of who strikes whom, when, are meager. Yet the Conference's assumption that a reduction from 10 to 5 peremptory challenges for the accused in felony cases will mean greater representation of nonwhite jurors on Federal juries is unwarranted unless the Conference can show that defense counsel has been responsible for systematically striking nonwhite jurors. Neither a reduction to 12 challenges in capital cases, or from 6 to 5 challenges in felony cases, prevent United States attorneys from winnowing or eliminating nonwhite jurors from Federal juries if they are so inclined.

The Judicial Conference's third and final justification for its amendments to rule 24(b) is, that a reduction in peremptory challenges will

speed up jury selection and save court time and costs. A canvass of 20 Federal public defender offices around the country reveals that the average time to impanel a jury in typical Federal criminal jury trials is about 70 minutes, give or take several minutes. Transparently, a total reduction in peremptory challenges of eight felony cases will save the taxpayer very little and the court very little time.

Let me close by noting some of the many advantages the Government currently has over the defendant in Federal criminal cases, which the Government will continue to have with or without the proposed amendments to rule 24(b).

First, in many multiple-defendant cases, the defendants are obliged to exercise its challenges jointly, while there is only one government.

Second, defendants face severe difficulties in obtaining adequate appellate review in the jury selection area because of the discretion allowed the trial judge.

Third, making a showing of community prejudice is beyond the resources of most defendants in Federal courts.

Fourth, the composition of Federal jury systems substantially underrepresents young and nonwhite people, who, studies show, are less likely than other people to harbor a priori prejudice against criminal defendants.

Fifth, voir dire in most Federal courts is judge-conducted, and perfunctory, and does not provide a proper predicate to defense counsel for making cause challenges and exercising peremptory challenges.

Sixth, the Government has greater access to information about jurors from its own records and as a result of its investigative powers.

If the sixth amendment guarantee of an impartial jury trial is to have real validity, the accused requires, as a bare minimum, a genuinely inclusive jury system, meaningfully conducted voir dire, enough peremptory challenges to winnow a jury panel of prejudice, and more peremptory challenges than the Government. As the Federal courts now operate, criminal defendants have too few of these assurances. To strip them yet further, would be a calamity for the administration of justice in a democratic society.

The least the subcommittee should do is to report out a bill maintaining rule 24(b) in its present form.

Mr. MANN. Thank you, Mr. Schulman.

Mr. Wiggins?

Mr. WIGGINS. Mr. Schulman, I was puzzled about one aspect of your argument. That is, the fact that eliminating or reducing the number of peremptories will increase the probability of a biased jury. That is your assertion; and that it would water down sixth amendment rights.

But a biased juror is, if identifiable, subject to challenge. I suppose we have to start with the premise that either the court or the careful interrogation of counsel will have identified those jurors who harbor this preconceived notion of either guilt or the suspicion of guilt which, you say, exists in society. They then would be subject to challenge for cause.

Now we have a panel in which those persons are presumptively eliminated and there is no basis for identifying a cause to eliminate a particular juror. Now we get down to almost the science of hunch.

Who do we eliminate in order to enhance the probabilities of successful lawsuits?

The trouble with your argument, as I am trying to explain, is that it assumes that the Government and the defendant can identify and challenge those people who harbor a bias for or against them, and I don't understand how it can do that, when they are no longer on the panel, by hypothesis.

Mr. SCHULMAN. If I may respond, sir. The problem with your argument is that, in current Federal practice, voir dire is so perfunctory, five to six questions typically being all that is asked, that insufficient material emerges for defense counsel to develop a cause challenge, and very few cause challenges are granted. So that is the reality currently in the Federal courts.

To then reduce the number of peremptory challenges available to the defense makes it all but impossible for the defendant to winnow the jury as he is entitled to under our Constitution. That is the assumption from which I am beginning.

Mr. WIGGINS. He wouldn't know who to winnow; would he?

Mr. SCHULMAN. He would not know who to winnow in the ordinary course of events. There are ways of trying to develop that skill and that is what, indeed, we have been trying to work on over the past years. It is a difficult matter for sure.

Mr. WIGGINS. This member, at least, is not sure how he stands on this 24(b) proposal. I have somewhat of a resistance to change. Unless the proponents of the change carry the burden successfully, in my mind, for the change, I am just not necessarily satisfied with your argument.

I would almost rather you would fold your arms and say, "I am here to resist your change unless you come forward with a reason." I have yet to hear your reasons and I hope that someone will give me more reasons.

Mr. SCHULMAN. I would hope that, because I think that a careful reading of the published notes of the judicial conference does not provide those reasons.

Mr. WIGGINS. I think the time saving is insignificant and I don't attach great importance to that.

Thank you.

Mr. MANN. Mr. Hall?

Mr. HALL. I would like to compliment the gentleman on the manner of his presentation. Having practiced law for over 25 years in both State and Federal courts in Texas, primarily in the eastern district of Texas and the western and northern districts, I have certainly had firsthand experience of the perfunctory nature of voir dire in Federal courts.

You mentioned a moment ago that the average time that your research showed was about 70 minutes of voir dire in a criminal case. That is about 40 minutes longer than we have in the eastern district of Texas. It is all conducted by the court except for a few questions that might be allowed to be asked by the defense counsel.

I am not at all impressed, as Mr. Wiggins indicated, with the saving of time. I think when a defendant is being tried, regardless of whether it is capital or noncapital, that in representing him—I have to say that

I have only represented defendants from that side and not from the State or Federal side—but I have never been in too big a hurry to try to get the defendant's rights. I think time is the best lawyer the defendant has, whether it be in voir dire or what.

I would like to ask this question if you can answer it, sir: Has any member of the Supreme Court presently existing ever tried a criminal case in either State or Federal court?

Mr. SCHULMAN. I cannot answer the question, sir.

Mr. HALL. I am asking because I don't know. Maybe someone here could answer that. If they haven't—and I am constrained to believe that the majority of them have never tried a criminal case—they may therefore be much removed from the scene of the pit, you might say, and might not be the best ones to pronounce judgment on a rule of criminal procedure, even though they have the authority. I am not questioning that, but I do sometimes question the people who start making changes in rules that they have never experienced in the trial of cases, as they now exist in certain areas.

I notice that the committee, on page 14 of the Rules of Criminal Procedure, "recognizes the value of peremptory challenges in assuring a fair trial."

Can you give me the answer as to whether if they believe that assuring peremptory challenges—I presume as it is now—whether it means that he would receive less of a fair trial if the peremptory challenges were reduced substantially?

Mr. SCHULMAN. That is my experience and my judgment, sir.

Mr. HALL. I also notice that it says in rule 24 that it would leave up to the court that, a motion for relief under (b)2 shall be filed at least 1 week in advance of the first scheduled trial date, or within such time as may be provided by the rules of the district court.

Again going back to the eastern district, we are never furnished jury lists, in some of the courts that I have been in, until 3 or 4 days before a case is set for trial.

Do you know of any provision that has been made to get around that 1-week requirement?

Mr. SCHULMAN. That operates according to local rules, sir. Indeed, in many Federal courts the jury list is not available until the morning voir dire starts. The jury project has perhaps been the preeminent group in the country called upon to make showings of community prejudice in Federal cases.

I can assure you that the cost of our services simply is beyond the means of the typical Federal defendant. Whether one is called to work on a case by John Mitchell or Maurice Stans or by an Indian in South Dakota, the cost exceeds \$15,000 to \$20,000 to do a substantial survey of a judicial district in the Federal courts. That then, also, typically is followed by a publicity analysis if the cases involved substantial publicity, which is also a costly matter. Public defendants do not have those resources.

Mr. HALL. Do you have any experience as to whether or not in the studies that you have made Federal judges are prone to have a view of conviction rather than acquittal?

Mr. SCHULMAN. It has been my experience in observing many Federal judges that the record is mixed, that there are a number of judges

who are very concerned to be objective and neutral and there are some who put the burden on the defendant and there are very few who really believe that the burden falls on the Government in most matters.

My experience has been that it is a very mixed bag.

Mr. HALL. Of course, I would certainly object to giving any more discretion to Federal judges than they now have because I think they have stretched their discretion in many instances beyond the breaking point.

Thank you.

Mr. SCHULMAN. I do have one other observation on your question. I have found that Federal judges resist very substantially the idea that a community is too prejudiced to be able to afford a criminal defendant a fair trial.

Changes of venue in Federal courts are a very rare event and providing relief in the form of additional peremptory challenges is a relatively rare event and typically only occurs where there is a showing of extreme publicity.

Mr. HALL. Thank you.

Mr. MANN. Mr. Hyde?

Mr. HYDE. Thank you, Mr. Chairman. I, too, want to compliment the witness.

I am persuaded that unless there is a showing of some very great advantage to the administration of justice by changing the number of peremptory challenges, that we should not do so.

You said if you have multiple defendants they are required to exercise their challenges together, collectively?

Mr. SCHULMAN. Oftentimes they are. The rule states that the court can enjoin that the defendants exercise their challenges jointly or separately, but practice is almost invariably that defendants will be asked to exercise them jointly.

Mr. HYDE. It would seem to me that narrowing the number of peremptory challenges heightens the opportunity, however, to have a representative cross-section of the community on the jury. If you have a white defendant and a black complaining witness, the defendant is going to want to eliminate as many blacks as possible from the jury, just as it would be the other way around.

The more peremptories you have, the more opportunities for removing whole classes, ethnic classes, economic classes, from the jury. So to that extent, lessening the number of peremptories, it would seem to me, does not help keep the mix, the cross-section of the community.

By the same token, even I would rather let that judgment be left up to the defense counsel and the prosecution who have the responsibility of trying to get the jury most favorable to their side.

Mr. SCHULMAN. If I might just comment on that, sir, my experience in a large number of very well publicized Federal cases is that it is the U.S. attorney who is most likely to eliminate people from a particular group. Defense counsel is more likely to take jurors from whence they come and to operate on whim or caprice.

But in case after case that I have participated in, I have observed U.S. attorneys striking people who they regard to have some prejudice against the Government, young people in particular and non-white people in particular, although our data show that nonwhite

people and young people are no more particularly likely to be anti-government or pro defendant. They are more openminded, sure.

I think that the argument that is put forward by the Supreme Court and the judicial conference assumes that defense counsel—after all, it is defense counsel that is going to lose most of the challenges under the amended rule—is likely to engage in this kind of striking.

Mr. HYDE. I defer to your superior experience with many more juries than I am familiar with, although it would be my judgment that defense counsel would certainly want to get off all kinds of people. He would like to get off accountants and bank tellers and people like that, and keep on the salesmen and artists.

But in any event, I have no further questions. Thank you.

Mr. MANN. Mr. Evans, do you have questions?

Mr. EVANS. Yes, sir.

Mr. Schulman, I apologize for being late. I would like to ask your opinion of the change of the rule. I think I understand from counsel here the position you have taken. But in the recent developments that we have of the past few years with the grand jury system such as it is, in which the district attorney can more or less determine whether or not an indictment is returned, the witnesses in the grand jury have no counsel in the grand jury itself.

Federal judges, whether they be prosecution minded or not, certainly have the ability to be prosecution minded. They have the opportunity. As you have pointed out, they do resist change of venue. It is hard for them to believe that a community that draws Federal grand juries can be prejudiced to the extent that a fair jury cannot be chosen, with the omnibus crime bill, under which a person can be convicted with very little evidence, in my opinion, under the conspiracy laws.

Do you think there is any excuse for us changing the present rules which would take one more step away from an accused person having the opportunity to at least defend himself?

Mr. SCHULMAN. I not only think there is no substantive reason to change rule 24(b), but I would urge that at some point the subcommittee consider strengthening the right of defendants by vitiating the parity in capital cases. It is now 20-20 if the rule remains the same. Particularly given the likelihood of a Federal capital punishment bill, it seems to me that it is very wrong to have the Government at parity in capital cases or treason cases with the defendant.

Moreover, it seems to me that the committee ought to be thinking about trying to give back to defendants lawyer conducted voir dire in Federal court, because it seems to me that the diminishment of voir dire conducted extensively by lawyers has done more to eclipse defendants' rights than any other single thing that has happened in the Federal courts.

Mr. HALL. Would you repeat that last part?

Mr. SCHULMAN. Thank you for the opportunity. I was trying to say that the tendency for Federal judges to usurp the right of conducting voir dire and the way in which they conducted voir dire has done more to diminish the rights of defendants than anything else, and I would hope that as the ABA has urged the Congress, that it will take some action to try to give back voir dire to the defendant.

Mr. MANN. Will the gentleman yield at that point?

Mr. HALL. Yes.

Mr. MANN. What is the history of that? Has there been any change in the rules of criminal procedure in the last 40 years?

Mr. SCHULMAN. It has been discretionary.

Mr. MANN. There has really been no rule or law change? It is just a matter of practice.

Mr. SCHULMAN. A matter of practice, is my understanding. But it has become extremely widespread and pervasive. It is the very rare Federal judge who permits counsel to conduct voir dire or even to intervene in any way, shape or form in the voir dire process.

Mr. EVANS. Could I continue, Mr. Chairman?

Mr. MANN. Yes.

Mr. EVANS. Then am I reading you correctly, Mr. Schulman, that if changes are made in the number of peremptory challenges, that it would be your recommendation that the number of State challenges be increased rather than the number of defendant challenges being decreased?

Mr. SCHULMAN. I would urge, if it ever came to that, the increase in challenges for the defendant and the decrease of challenges in capital cases for the Government. I think the Government has enough to take care of its own under the current rule 24(b). I think that the defendant is adequately protected in felony cases, but the situation is much different in capital cases where there is a parity of 20-20.

It seems to me that the Government is entitled to fewer and that justice would be better served if indeed the Government had fewer peremptory challenges in capital cases.

Mr. EVANS. This may be a little off the subject, but it still ties in with the general subject matter. Have you had experience with the collaboration between the people making the investigation, the Federal officials, if you will, and the prosecution in Federal cases to an extent that it is very difficult for an adequate defense to be prepared? Have you had any experience at all in observing this?

Mr. SCHULMAN. In observing the collaboration between the investigators for the U.S. Attorney and the U.S. Attorney's Office?

Mr. EVANS. Right, the full participation by the U.S. Attorney's Office in the investigation.

Mr. SCHULMAN. The investigation of prospective jurors?

Mr. EVANS. No, the investigation of prospective cases.

Mr. SCHULMAN. No, I have not. I have no experience in that respect.

Mr. EVANS. Thank you.

Thank you, Mr. Chairman.

Mr. MANN. Mr. Schulman, by what method did you arrive at your data on the presupposition of guilt?

Mr. SCHULMAN. We have done many surveys. The finding that we have is very consistent that a minimum of 30 percent of the over 14,000 prospective jurors that we have interviewed across the country believe that an indictment is tantamount to guilt and that the burden is not on the Government to prove the defendant's guilt, but the burden is on the accused to prove his innocence.

So I start with that finding, which has consistently occurred and been verified by many different surveys we have done. Then to provide a simple calculation, I assume the Arizona plan, which is the struck

system, and that is in very wide use in Federal courts. The nature of that system is that you first qualify prospective jurors for a cause. You pass them for cause.

So you require 12 jurors and then if you have 10 peremptories for the defendant and 6 for the Government, you qualify 28 jurors and then each side strikes. So then I take 30 percent of the 28 and ask how many of those would be likely to be tarnished and I derive the calculation.

Now, the assumption here is that those jurors will not, all of them who have that view, be found out by the voir dire process for a variety of reasons.

Mr. MANN. I understand the application of that. In determining it in the first instance, you rely on public opinion surveys and polling and that sort of thing?

Mr. SCHULMAN. Yes, and post-trial interviews. We have done a great number of post-trial interviews with Federal jurors, both people who were struck and people who actually served on juries. I would say at least 500 of such interviews over the last 7 years.

Mr. MANN. Just to clear up my thinking on it, since I have been away from it so long, the joint or separate exercise of peremptory challenges by multiple defendants—by joint you mean that they confer on a particular juror and the judge lets them divide up the peremptory challenges? It is his discretion as to whether or not to give them additional challenges or to give each defendant the full amount?

Mr. SCHULMAN. Exactly so.

Mr. MANN. In most cases, do they make them divide up the total peremptory challenges for the defendants?

Mr. SCHULMAN. In most cases they require them to exercise them jointly with no additional challenges. A good example would be the Governor Mandel trial in Maryland where he has a number of co-defendants and they have additional peremptory challenges.

They have conflicting interests, but they are obliged to exercise their challenges jointly, and that creates a nightmare for those defendants.

Mr. MANN. They were given additional challenges by what procedure?

Mr. SCHULMAN. They were given additional challenges by making a showing of the pretrial publicity and indeed also as a result of a public opinion survey that was done showing the amount of prejudice that attached to Governor Mandel and his codefendants.

Mr. MANN. But that was a discretionary decision.

Mr. SCHULMAN. Yes, it was.

Mr. MANN. Let's get to what appears to be the nub of the rationale for this rule. It permits the systematic elimination of members of a given group from a jury.

It has been my experience in the law that that is what peremptory challenges are all about, whatever you might call that group, whether it is based upon age, sex, religion, trade, occupation or whatever.

Do you infer, as I do, that perhaps the drafters of the proposed amendment are trying to read into the term "impartial jury" some of our current civil rights concerns about, putting it loosely, proportion-alism in our society? Do you perceive that is what they are influenced by?

Mr. SCHULMAN. I think they are influenced by that. I think they are in some senses trying to legislate in *Swain v. Alabama*,¹ in which that issue came before the Supreme Court.

I think also that the Conference is creating a straw man here. That is to say, I think they are anxious to streamline the Federal court procedures. They are anxious to reduce peremptory challenges. They have been anxious to do that for a long period of time.

I think that they are offering this as a lollipop to the Congress and to the public. I don't think they seriously intend that to happen or think that that will happen, although I think that is part of the rationale that they put forward.

Mr. MANN. Of course, depending upon the area of the country that may or may not be solving any problem.

Mr. SCHULMAN. I appreciate that. You were asking me to speculate about their motivation. It is very difficult to do that. I just know that it is not likely to happen and that it may well be motivated by what you suggest.

Mr. MANN. We will have the opportunity to question the drafters, and you have been very helpful in giving us some ammunition.

Who do you think they include in the term "members of a certain group" as that term is used in the advisory committee note?

Mr. SCHULMAN. The way I read that, it could only mean nonwhite people or young people or possibly women, because under the current rules of qualification or disqualification, women who have children under 12 can take an automatic disqualification.

What that means is that women who have children are largely absent from Federal juries and they could conceivably mean that group.

Mr. MANN. I am now treading on tender ground when I ask you again about the orientation of Federal judges.

It is my experience that we lawyers who have had a substantial criminal practice don't often fall into that category of distinguished attorneys who become Federal judges. I am not aware of any of our great criminal lawyers who have become Federal judges.

I think the type of lawyer who ends up being a Federal judge is one who is more likely to represent more politically important clients, to have a more politically important position in the community and a status in the community that we criminal lawyers sometimes don't enjoy.

I think your statement of a mixed bag is correct, but I wonder if the mix isn't a little bit more weighted in the direction of no real experience or no substantial experience in representing criminal defendants in Federal court.

Mr. SCHULMAN. I am sure that is true. My studies certainly have indicated that most Federal judges have a history of serving as U.S. attorneys or assistant U.S. attorneys, but have not equally served at the criminal defense bar and thus the orientation that they have typically is of that order, rather than the orientation which is developed by someone who has practiced for a long time as part of the criminal bar.

Mr. MANN. I am not necessarily laying this amendment at the feet of Federal judges alone. I realize it was drafted by a committee com-

¹ 380 U.S. 202 (1965).

posed of a more or less representative group, including some attorneys and professors.

Mr. Smietanka?

Mr. SMIETANKA. Mr. Shulman, one question. It was your observation that the Government exercises the preponderance of the peremptory challenges. However, isn't it also true that the defendant needs only one favorable juror and thus may not need to exercise as many peremptory challenges as the prosecutor who needs a unanimous verdict for conviction?

Mr. SCHULMAN. It has been my experience that the defendant requires more than one favorable juror, given the nature of the velocity of deliberations. That is, a single person who holds out is a very remarkable human and typically what happens in deliberations, I think, is a subgroup formation in which for a hung jury to occur there must typically be more than one person supporting each other, if they are to stand out against the majority.

But I think the larger question is that there are many reasons why jurors vote acquittal or vote a conviction. It is not simply and merely the predisposition that they come in with. It is also the nature of the facts that they hear in court and many other things that lead them to the decision they come to.

I think it is oversimplifying to try to suggest that the defense requires only one person in a jury decision and the Government requires twelve. The Government is not afraid to retry people when it has a hung jury and it does quite often.

Hung juries are not that frequent in Federal court. Indeed, the conviction rate is about 75 percent throughout the country, varying from jurisdiction to jurisdiction.

So the issue of the hung jury, I think, is somewhat overrated, and the idea that the defense requires only juror to win is really a somewhat simplistic view of how the process actually operates.

Mr. EVANS. Mr. Chairman?

Mr. MANN. Yes.

Mr. EVANS. On the other hand, Mr. Shulman, isn't it true that generally in a case of this type, or a criminal case, that the State has all the resources available to it to present a case against the defendant?

I would like to presume that sometimes innocent people are tried before our Federal courts. Isn't it further true that we often have jurors who presume guilt on the basis of the indictment? And with those things against a person who stands accused do we need to make the disparity greater by changing this group?

Mr. SCHULMAN. I think that is all true and that has been my testimony.

I would like to add to that that I have been very conservative here, and I hope that the members will appreciate that.

In point of fact, depending upon the nature of the crime and the nature of the defendant, whether there is a victim or not—and if there is a victim, who that victim is—the amount of prejudice in that district can well escalate beyond 50 and 60 and 70 percent, so that it is very, very difficult to find jurors who can in the slightest sense be fair.

I would cite to you the problem of trying to find fair and impartial jurors in South Dakota when two FBI agents were killed on the Pine Ridge Reservation. Ultimately, there was a transfer of venue to Iowa, a substantial distance away, where there is no perceived threat from Indians and where there is not the typical experience that white people have with Indians in South Dakota.

South Dakota is a State which is very liberal in many ways, but when it comes to the problem of the American Indian, it is a very difficult situation; and that is true too for many different kinds of defendants, many different kinds of crimes, many different kinds of victims.

So the situation is really much fiercer than the 30 percent that I was suggesting as a rock bottom kind of calculation.

Mr. EVANS. I think it is only human nature for us to be a lot more liberal about problems that other people have rather than problems we have in our own area.

No further questions, Mr. Chairman.

Mr. MANN. Thank you so much.

Mr. HYDE. Mr. Chairman, I just am reluctant to terminate this fascinating colloquy without commenting that it seems to me that the defendant is very much beleaguered by the burden of all this testimony, with prejudice from the community with harsh judges who have no experience with criminal practice, and with jurors who are convinced an indictment is tantamount to guilt.

If I may just ameliorate from my own experience and views, those comments, it seems to me that despite the absence of criminal experience by men who ascend to the Federal bench their own philosophy has been predominantly liberal and this lack of experience has in no way impeded their compassion for defendants, particularly in Chicago where I come from.

There are one or two judges there where defendants quake when they are assigned to them, but I think they get very much of a fair break from the others.

Defense counsel has enormous leeway that the prosecution doesn't have in the trial of a case. He can push to the outermost edge of misconduct and contempt, because the State isn't going to appeal for errors that defense counsel makes.

I think of Mr. Kunstler roaming over the Federal court as though it was a fraternity house.

Lastly, I agree that most people think indictment is tantamount to guilt, but by the time the trial is over, defense counsel should have spent 60 percent of his time informing them that the opposite is true and making it their sacred obligation to carry that knowledge with them to their graves.

Those are my comments. Thank you.

Mr. MANN. Thank you, Mr. Hyde. Thank you very much, Mr. Schulman.

Mr. SCHULMAN. Thank you, sir.

[The prepared statement of Mr. Schulman follows:]

STATEMENT OF THE NATIONAL JURY PROJECT

By Jay Schulman

My name is Jay Schulman. I am a sociologist and a founder and member of the National Jury Project. I have been qualified as an expert in jury composition and selection in a number of federal courts. The National Jury Project is a

not-for-profit corporation chartered in New York State. The focus of our work is the application of social science techniques to the strengthening of elements of the American jury system.

Since the beginning of this work in 1970, project members have worked on over forty federal criminal trials, involving both white and non-white defendants, in more than thirty federal court divisions. Although much of our work has involved highly publicized trials, we have studied the composition of a number of federal jury systems and have had considerable experience in the conduct of voir dire and the exercise of peremptory challenges in everyday court criminal practice.

I am here to speak in opposition to the proposed amendments to rule 24B. The over-riding issue before this subcommittee is whether the proposed changes in rule 24B are compatible with the sixth amendment right of accused to an impartial jury trial or whether the changes recommended by the Judicial Conference will have the effect of eviscerating that constitutional right.

The subcommittee surely knows that the eclipse of lawyer conducted voir dire and the trivialization of voir dire in most federal courts have virtually extinguished the cause challenge as a tool for minimizing partiality. The accused has left only the peremptory challenges allowed under rule 24B to minimize the prejudice that so easily attaches to criminal defendants in these times of great public sensitivity to crime.

The Judicial Conference is proposing two very basic changes in rule 24B. First, they would reduce the absolute number of peremptory challenges available to both sides in all federal criminal jury trials to twelve challenges in capital cases, five challenges in felony cases, and two challenges in misdemeanors. These changes would not enable the defense to achieve a jury free of bias against the accused.

Findings from 28 surveys conducted by the Jury Project in 25 federal divisions show that at least 30 percent of federal jury pools believe that an indictment, any indictment, is tantamount to guilt: that is, they believe the accused is guilty and must prove his innocence. (Cf. Appendix A.)

In felony cases at present, when the Arizona plan, the so-called struck system, is used, the final panel contains 28 prospective jurors, 8 of whom might fall into that category which assumes guilt apriori. The defense, with 10 challenges, is thus able to weed out those jurors who are prejudiced.

Under the proposed rule, the defense would have only 5 challenges to winnow a panel of 22 and yet a final panel of 22 might contain as many as 6.6 or 7 potential jurors who cannot grant the presumption of innocence to the accused. The predicament of the defense is compounded in those cases in which the crime and pretrial events have received extensive media coverage.

What is true in felony cases is even more true in death penalty cases, in which the charge alone arouses fear, loathing, anger, and a desire for revenge in a sizeable portion of the community.

The plain fact is that 12 peremptory challenges in a capital case and 5 peremptory challenges in felony cases are too few to afford the accused even the appearance of justice. The effect will be an even higher conviction rate accompanied by an increased alienation from the criminal justice system.

The second change proposed by the Judicial Conference would provide parity in respect to peremptory challenges to the government and the defense in all federal criminal cases.

The question is whether the interests of justice, for the public as well as the accused, is served by pretending that the government suffers as much apriori prejudice as does the accused.

Certainly both the government and the accused have an equal right to a fair and impartial jury. Certainly both the U.S. attorney and the defense attorney must be able to eliminate jurors either feels are prejudiced for or against their side.

But how much of a problem does the government actually face in minimizing prejudice against it? Our studies of major felony and capital cases reveal that not more than 5 percent of a jury pool begins service with an animus against the government or with a favorable view of even the most attractive criminal defendant.

Thus, in a felony case under the present rule, with a final panel of 28, the government needs only 1.4 (or 2) challenges to remove those presumed to be biased against them. Under the proposed rule, with a final panel of 22, the government would need only 1 challenge to protect its right to a fair trial.

In a capital case under the present rule, with a final panel of 52, the government needs 2.6 (or 3) challenges to be reasonably protected from partiality. Under the proposed rule, with a final panel of 36, the government would need 1.8 (or 2) challenges to be reasonably immune.

Suppose that our data understates by a factor of two or even three the animus attaching to the government in criminal cases. Applying the same formula, the government still has a surplus of strikes in all criminal cases under *both* sets of rules.

Parity for the government combined with a loss of half of its peremptory challenges leaves the defense with too few challenges to screen out potential jurors it would like to strike. The government, on the other hand, is left in the advantaged position of having more than enough peremptory challenges to eliminate all of those jurors it cares to.

The proposed changes in rule 24B vitiates rights of the accused which have been anchored in American jurisprudence for almost 200 years in capital cases and for 65 years in felony cases. Chart 1 (Cf. Appendix 2) shows very clearly that the amendments to rule 24B are radical departures from what has hitherto been considered as necessary to safeguard the right of the accused to an impartial jury trial. The 1970 Crimes Act codified the common law right of the accused to 20 peremptory challenges in capital cases and gave the accused a ratio of four to one in peremptory challenges over the government; while the 1911 Crimes Act accorded the accused 10 challenges and a ratio of 10 to five or two to one over the government.

The Judicial Conference began its efforts to change rule 24B as long ago as 1960. In 1962 the Conference promulgated and disseminated a draft of the identical rules it is seeking to have adopted in 1977. The Judicial Conference abandoned the attempt to take these changes forward because of the strong opposition encountered from the legal community. What has happened in recent years to persuade the Conference to try again with these proposals? The Conference's answer is that the Congress' passage of the 1968 Jury Selection and Service Act has lessened the need for peremptory challenges.

The Advisory Committee implies that a large number of peremptory challenges (20 in capital cases and 10 for the accused in felony cases) is contradictory to the spirit of Congress in passing the 1968 Jury Selection and Service Act, which based federal jury service on a random selection from lists of registered voters in a judicial district. But the legislative history of the 1968 Jury Selection Act does not show that Congress linked the creation of a more representative jury system to a reduction in peremptory challenges.

The Advisory Committee obviously believes that a representative jury system mirroring its underlying civic population lessens the need for peremptory challenges. However, prejudice is just as likely to operate among jurors originating from a broad community cross-section as among jurors who are selected more narrowly. A more representative jury system does not mean prejudice-free jurors, and thus does not obviate the need for peremptory challenges.

The Judicial Conference hypothesizes that fewer peremptory challenges for both sides will lead to greater representation on petit juries of sub-groups which have been underrepresented or excluded because of the exercise of peremptory challenges. I assume that the Advisory Committee has nonwhite people mainly in mind.

There are two issues: First, are there so few nonwhites appearing in venues in many federal divisions that either side can use its strikes to limit or exclude nonwhites from participation on federal juries? Second, does one side or the other or both sides concentrate their strikes against nonwhite jurors?

Trial experience and the several reported federal cases show that defense counsel tend to accept nonwhite jurors in most types of criminal cases whereas government attorneys seem to strike nonwhite jurors consistently, particularly in cases in which nonwhites are defendants.

For example, the United States struck all nonwhites who otherwise qualified in ten recent jury trials in which American Indians were defendants. The U.S. struck 81 percent of the black jurors eligible to serve in thirteen trials held in the Western District of Missouri in which the defendants were black. (Cf. U.S. vs. Carter, 58 F 2nd 844 at 848, 8th Circuit, 1975 cert den, May 3, 1976.) In the Hartford division of the Connecticut District, the U.S. struck 94 percent of the black potential jurors in seven trials in which blacks were defendants whereas defense counsel struck no blacks. In the same federal division, the U.S. struck 90 percent of the black potential jurors in sixteen trials in which whites were

defendants whereas defense counsel struck 8 percent of the blacks. (Cf. U.S. vs. Honorable Jon O. Newman 663 76-3077, 2nd Circuit.)

To be sure, the facts of who strikes whom, when, are meagre. Yet the Advisory Committee's assumption that a reduction from 10 to 5 peremptory challenges for the accused in felony cases means greater representation of nonwhite jurors on federal juries is unwarranted unless the Committee can show that defense counsel has been responsible for systematically striking nonwhite jurors. Neither will a reduction to 12 challenges in capital cases and to five challenges in felony cases prevent U.S. attorneys from winnowing or eliminating nonwhite jurors in most federal courts if they are so inclined.

The Judicial Conference's third and final justification for changing rule 24B is that a reduction in peremptory challenges will speed up jury selection and save court time and costs.

A canvass of twenty federal public defender offices around the nation shows that the average time to impanel a jury in everyday federal criminal practice is seventy minutes, give or take a few minutes.

Transparently, a total reduction in peremptory challenges of six in felony cases will save the taxpayer very little money and the court very little time.

Let me close by noting some of the many advantages that the government has over defendants in federal criminal cases, which the government will continue to have with or without the proposed changes in rule 24B.

1. In many multiple defendant cases defendants are obliged to exercise challenges jointly while there is only one government.

2. Defendants face severe difficulties in obtaining adequate appellate review in the areas of voir dire and jury selection because of the discretion allowed the trial judge.

3. The government is often in a position to choose the location of a trial.

4. Making a showing of community prejudice is beyond the resources of most defendants and the budgets of federal public defender offices.

5. The composition of federal jury systems substantially underrepresent young and nonwhite people, whom studies show are least likely to hold a priori prejudices against criminal defendants.

6. Voir dire in most federal courts is Judge-conducted and perfunctory and does not lay a proper predicate for making cause challenges and exercising peremptory challenges.

7. The government has greater access to information about jurors from its own records and as a result of its investigative powers than do defense counsel.

If the sixth amendment guarantee of an impartial jury trial is to have validity, the accused requires as a bare minimum a genuinely inclusive jury system, meaningful voir dire, enough peremptory challenges to winnow a jury panel of prejudiced jurors, and more peremptory challenges than the government.

As the federal courts now operate, criminal defendants have few enough of these assurances. To strip them still further would be a calamity for the administration of justice in a democratic society.

The least the subcommittee should do is report out a bill maintaining rule 24B in its present form.

Mr. MANN. Our next witness is Mr. Terry Philip Segal, of Boston. Mr. Segal is counsel for the firm of Silverman & Kudisch. He is chairman of the Subcommittee on Criminal Tax Penalties of the American Bar Association.

We welcome you to the subcommittee. The prepared statement that you submitted will, without objection, be made a part of the record and you may proceed as you see fit.

TESTIMONY OF TERRY PHILIP SEGAL, ATTORNEY, BOSTON, MASS.

Mr. SEGAL. Thank you, Mr. Chairman.

My name is Terry Philip Segal. I am a Boston attorney, who is counsel to the firm of Silverman & Kudisch. My practice consists mainly of civil and criminal litigation. I also teach courses in criminal procedure and trial practice at Boston College Law School.

Prior to entering private practice, I spent 4 years as an Assistant U.S. attorney for Massachusetts and the District of Columbia.

I am also chairman of the American Bar Association's tax section's subcommittee on criminal tax penalties, but since the subcommittee and ABA tax section have taken no formal position on rule 6(e) the views I express are solely my own and do not necessarily represent those of the ABA criminal tax penalties subcommittee or the ABA tax section.

I appreciate this opportunity to give you my views about the proposed amendment to rule 6(e). The proposed amendment has a legitimate purpose: to permit Government attorneys to obtain help in grand jury proceedings from other Government personnel where their expertise has been demonstrated to be required.

Apart from the difficulties of delineating the type of demonstration which must be required for Government attorneys to obtain help, my concern is that, as presently drafted, the 6(e) amendment could permit disclosure of grand jury proceedings to administrative agencies to assist said agencies in their own pending separate administrative investigations.

Since administrative agencies' powers of investigation are far more limited than the far ranging powers of the grand jury, disclosure of grand jury information to administrative agencies not only diverts the grand jury from its historic duty, but gives administrative agencies powers not specifically conferred by Congress.

Dating back to the Assize of Clarendon issued by Henry II in 1166, the grand jury has always had the duty of investigating crime.

Grand jury investigations have traditionally been conducted in secret. There are sound reasons for grand jury secrecy such as preventing flight, encouraging maximum disclosure by witnesses and protecting the rights of the potential accused.

Grand juries have also traditionally had powers beyond any administrative agency. For example, a grand jury can initiate a general inquiry into criminal conduct without selecting a specific target. There is no requirement that evidence be relevant before the grand jury has a right to consider it. An accused is not entitled to notice of any proposed charges. A grand jury witness has no right to have counsel before the grand jury, and his testimony can be compelled by grant of immunity.

Additionally, a grand jury subpoena is not subject to the same limitations as a civil summons.

In describing the grand jury's far-reaching powers, one commentator noted, "... the only justification, if any, for the grand jury's massive intrusions upon freedom and privacy is the importance society has attached to detecting criminal activity and bringing to justice those responsible."

On the other side of the coin, Congress and the courts have specifically limited the tools available to administrative agencies in conducting their investigations. Agency subpoenas must pass muster under the fourth amendment.

By statute, Federal agencies are required to issue subpoenas only for evidence which is "relevant" and "material" to the inquiry.

Additionally, a witness called to testify in an agency proceeding may have counsel present and may readily obtain a transcript of his testimony.

In short, to permit disclosure for use in administrative investigations makes the grand jury, presently a constitutional entity under court supervision, an instrument of an administrative agency, a branch of the executive. Such disclosure not only diverts the grand jury from its true function of investigating crime, but gives executive agencies powers not specifically conferred by Congress.

As Judge Hufstедler recently stated in *Simplot v. IRS*, slip opinion at page 6 (9th Cir. decided November 12, 1976), a case where the court denied IRS personnel assisting the U.S. attorney access to grand jury material without an adversary hearing and showing of "particularized and compelling need:"

The IRS possesses a broad arsenal of investigative tools for discovering civil tax liabilities. In creating these weapons, Congress provided what it believed was necessary to protect the public. Congress did not see fit to grant the IRS access to grand jury materials in criminal tax investigations.

The advisory committee was aware of the potential for abuse in connection with the proposed amendment to rule 6(e):

"The court may inquire as to the good faith of the assisting personnel, to ensure that access of material is not merely subterfuge to gather evidence unattainable by means other than grand jury. Advisory committee note."

Let me suggest that this committee consider making meaningful the concern expressed by the advisory committee by drafting additional language to 6(e); so 6(e) would now read:

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any jury may be made to the attorneys for the Government for use only in connection with any assistance they render to the grand jury.

For purposes of this subdivision, "attorneys for the Government" includes those enumerated in rule 54(i). It also includes such other Government personnel are necessary to assist the attorneys for the Government in the performance of their duties.

To obtain assistance of other Government personnel, the attorneys for the Government must upon a proper showing before the appropriate court, demonstrate such personnel are necessary to assist them in a grand jury investigation. To obtain disclosure of grand jury material for use by administrative agencies, the Government, at an adversary hearing, must show particularized and compelling need.

Thank you, Mr. Chairman.

Mr. MANN. Thank you.

Ms. Holtzman?

Ms. HOLTZMAN. Mr. Chairman, I think the point that has been made is a valid one, and I think the suggested language is something that should receive our serious consideration.

Mr. MANN. Mr. Hyde?

Mr. HYDE. Yes, sir. I am concerned about an adversary proceeding. How, Mr. Segal, would you have an adversary hearing to obtain disclosure of grand jury material when, as yet, there may be no adversary?

Mr. SEGAL. Let's take a hypothetical case. The grand jury investigates somebody for possible tax fraud. They can't make a criminal

case. They want to send it over to the IRS to use in a civil enforcement proceeding, the 50 percent fraud penalty.

There is a target. They have amassed evidence against that one particular taxpayer, but somebody has made a decision not to go criminally.

He would be the adversary. He would be the person who should be represented at the hearing before that information is then turned over to the administrative agency.

Mr. HYDE. I can understand that, but I can also hypothesize a case where they don't really know what they have. They have a lot of records pertaining, perhaps to industrial espionage or something, and they need some expert to look at it and tell them what they have.

As yet, there is no indictment and no adversary, yet they want to have accountants, metallurgists and so forth look at this stuff.

Mr. SEGAL. There are two issues here. I can say when I prosecuted tax fraud cases, it was essential to have the help of the IRS personnel at the grand jury level. Quite honestly I would have sometimes been lost without them.

I don't object to Government personnel assisting the attorneys in connection with grand jury investigation.

You need that help.

I think the Government, however, should be required to make some showing to the court.

I don't say that the hearing should be an adversary hearing. I think that the Government can submit an affidavit and the court can have an ex parte hearing to determine the number of personnel required and if each of them is necessary to assist the grand jury.

The grand jury needs that expertise.

The adversary hearing I contemplate is after the grand jury has finished its work and wants to send that information back to some administrative agency, or some administrative agency wants that information in connection with an administrative investigation. At that time I respectfully suggest you need the adversary hearing, because you shouldn't breach grand jury secrecy, absent compelling need.

Mr. HYDE. Then the operative language is "for use by administrative agencies."

I think we ought to take a look at this and draft it in such a way that other than attorneys for the Government may have access to this, when their access is reasonably necessary to inform the Government as to the nature of where they are going and what they have got.

But whether for use other than by the grand jury for the particular purposes of the grand jury, then an adversary hearing would be relevant.

I don't know that this language doesn't do that, but I wish it would.

Mr. SEGAL. I am not sure it does either.

In short, the first procedure would not be an adversary hearing. Yet the Government would still have to make some showing to a court that these people are necessary to assist the grand jury, and the court might say, well, you don't need 24, you only need four.

Mr. HYDE. And the information they derive will remain with this grand jury for its purposes and not be shuttled over to the Environmental Protection Agency, and so forth.

Mr. SEGAL. That is right.

If the Environmental Protection Agency wants it, that is the adversary hearing I contemplate.

Mr. HYDE. I agree with you.

Mr. SEGAL. I think the committee should consider some check procedure so that it can't float over without court supervision, people signing in and signing out who have access to the transcript, and so forth.

Mr. HYDE. If we may get the free services of very eminent counsel, if you can draft something like we have been talking about, I am sure the committee would be glad to see it.

Mr. SEGAL. I will be glad to do so. Thank you, Congressman Hyde.

Mr. MANN. Mr. Hall?

Mr. HALL. Mr. Segal, you stated a moment ago toward the conclusion of your testimony that these outside people would be given access to grand jury records. I have tried to write down here, where would the assistance have been given before papers would be given to these outside people? Would it be a hearing before the court and for the court to determine at what phase of the hearing these outside administrative people that you are talking about, coming in under this proposed amendment, assisted the district attorney in some way?

Mr. SEGAL. I think I contemplated two separate court proceedings, Congressman. The first is, if the U.S. attorney wants the expertise of other Government personnel that aren't attorneys, he should file some sort of affidavit with the court saying, "I want to use X, Y, and Z who have this particularized background in connection with this investigation for the following reasons, and the grand jury information will only be disclosed to these people so they can assist us with this ongoing grand jury investigation."

Now, that is not an adversary hearing, but the court still can examine the pleadings and make a determination: "Do you need all those personnel? Are they necessary people to assist the U.S. attorney?"

If, down the road, after the grand jury has finished deliberations or at some other time, an administrative agency now seeks to use that same grand jury material, the court would have to hold an adversary hearing, and the burden would be upon the Government to show particularized and compelling need before that material is released from the grand jury and sent back to an administrative agency.

Mr. HALL. What this, in effect, says is that upon a proper showing by the U.S. attorney that some administrative agency has assisted him in the trial of the prosecution of the case that administrative agency, if the evidence warrants it to the court, will have the right to that grand jury information in re any extraneous things that that other agency may attempt to do to that particular defendant.

Mr. SEGAL. After an adversary hearing before the court where the defendant is represented, yes.

Mr. HALL. I understand.

Mr. SEGAL. And if the Government meets the burden. I am not sure that is too much different than the second sentence of rule 6(e) now. In other words, there can be a disclosure of matters appearing before the grand jury "only when so directed by the court preliminarily."

So upon some showing, it still can do so. I just wanted it in an adversary hearing.

Mr. HALL. My next question was, don't we have that now in 6(e)?

Mr. SEGAL. I don't think you have it as to an adversary hearing. I don't think there is any requirement under 6(e) that that hearing be adversary. I think that is my change. The case law under that be disclosure provision is basically "particularized and compelling need," but I don't think any defendant now has a right to an adversary hearing—he won't find out about it until a year later.

Mr. HALL. Suppose, for instance, that a grand jury investigation is investigating someone for a violation of using the mails in interstate commerce to defraud, for example, and in the course of that investigation something may come up with reference to income tax evasion, but the grand jury no-bills the defendant.

Is it your understanding that under this proposed rule that the IRS can come in and make a proper showing and get access to those grand jury records to prosecute that person again on an income tax violation?

Mr. SEGAL. Without the benefit of an adversary hearing, yes, as the rule now stands. That is correct. I think the potential defendant should have a right to an adversary hearing before that material is disclosed by the grand jury to an administrative agency.

Mr. HALL. Of course I agree. Don't you think that this is just a small hole in the dike toward the releasing of information that historically has been held secret if this amendment is passed?

Mr. SEGAL. I think the amendment as drafted doesn't have the appropriate safeguards, so it is a hole in the dike. In other words, material could be released under that amendment to administrative agencies without a proper showing. You would have breached the secrecy of the grand jury. I am not sure that is what is contemplated by the Supreme Court Advisory Committee, but I think the language should be clarified so that administrative agencies couldn't get it absent some compelling need in an adversary hearing.

Mr. HALL. Can you see any compelling need for the proposal to be adopted by this subcommittee?

Mr. SEGAL. As drafted?

Mr. HALL. Yes.

Mr. SEGAL. Not in the present form. I do, however, favor rule 6(e) with appropriate safeguards—the safeguards I am proposing put in more control on the secrecy of the grand jury than exists under the present rule, because I contemplate an adversary hearing before that material is disclosed to an administrative agency. That doesn't happen now.

Additionally, I have to feel that a lot of grand jury material is sub silentio disclosed. It is very tough for an IRS agent who is assisting the grand jury to then go back to the IRS, pick up the same case, and even without the benefit of the transcripts, wipe from his mind all the leads and information he has developed as a result of assisting the grand jury.

I am not sure the present rule is a strong rule for secrecy of the grand jury. I think there are a couple of loopholes in there that should be closed.

Mr. HALL. It is not your testimony to this subcommittee that you advocate that the secrecy of grand jury testimony be in any way made less binding than it now is?

Mr. SEGAL. I hope I was clear. The thrust of my testimony is that you should do everything possible to tighten the secrecy of the grand jury and only disclose information under certain compelling conditions. The rule as presently constituted in the proposed amendment, in my judgment, doesn't give you enough safeguards for protecting the secrecy of the grand jury.

If you are going to make a change, I would hope you would do it with sufficient language that would tighten up the present rule and tighten up even further the proposed amendment.

Mr. HALL. But the proposal that has been submitted to us does not do what you are suggesting.

Mr. SEGAL. I would submit, it doesn't.

Mr. HALL. I agree with you.

Mr. SEGAL. The language "attorneys for the government also includes government personnel as are necessary to assist the attorneys for the government in the performance of their duties," is the proposed Supreme Court amendment. Those same personnel could then go back and work on a civil case without getting the grand jury transcripts, in my judgment, and have all the benefit of that information which should have been secret before the grand jury.

Mr. HALL. You are saying it should be an adversary proceeding before they get it?

Mr. SEGAL. That's right.

Mr. HALL. Thank you, sir.

Mr. MANN. Mr. Evans?

Mr. EVANS. Yes, sir.

You are saying that even under the present rules, we have too many violations of the grand jury secrecy?

Mr. SEGAL. I think the present rule could lead to such violations. It is not clear enough. The present rule does not adequately protect grand jury secrecy.

Mr. EVANS. How long has 6(c) been in existence in its present form?

Mr. SEGAL. I cannot tell you.

Mr. EVANS. Do you know of any experience in which there has been such a violation or there has been such an improper use of the knowledge obtained by someone who assisted in the prosecution or in the presentation to a grand jury of a particular case?

Mr. SEGAL. The advisory committee cites a case, *In re April 1956, Term Grand Jury* 239 F. 2d 263 (7th Cir. 1956). In that case the IRS was proceeding on a civil basis. The summons was in connection with criminal tax liability but was a civil investigative proceeding. The summonses were sent and they weren't answered. The potential defendants objected. A grand jury was convened. The same, or just about the exact same, summonses were then issued by the grand jury.

As I read the case, the grand jury subpoena was solely for the purpose of giving the IRS the information they had tried to get civilly and had been blocked from getting. There is very strong language in there, wherein the court suggests that type of procedure is an abuse of the grand jury because it makes the grand jury an arm of the administrative agency, rather than vice versa.

Mr. EVANS. Is there any justification whatsoever in ever releasing information, even with an adversary proceeding, from a criminal investigative grand jury to any civil bureau administrative agency?

Mr. SEGAL. I suppose if the grand jury has finished a possible criminal tax investigation, determined that the potential defendant will not be indicted, rather than have the IRS go over the same ground again if the IRS can make a proper showing, they should be allowed to have that information sent back to them in connection with subsequent civil tax proceedings.

Otherwise, there would be a tremendous duplication of resources and the same person would be summonsed two times. He has been before the grand jury once and now he will get the 7602 summons from the IRS. If the IRS had the benefit of that information, they probably could short circuit that and go forward with what information the grand jury has developed, which could be useful in connection with a civil tax case they might have.

Mr. EVANS. But they would still be using the grand jury for the purpose of a civil case?

Mr. SEGAL. That's right.

Mr. EVANS. And the only justification would be to save money and time.

Mr. SEGAL. At the moment I cannot think of any other. I don't, however, represent the Government any longer, so I will leave it to others to answer that point.

Mr. EVANS. Thank you, Mr. Chairman.

Mr. MANN. Thank you very much.

Mr. HALL. Mr. Chairman, may I ask one other question?

Mr. MANN. Yes.

Mr. HALL. One other question, sir. Assuming that after you had an adversary proceeding the court allowed the IRS agents to have access to grand jury investigation which was separate and apart from what the grand jury was investigating but as an ancillary matter came up, maybe a tax fraud case, and they got that information, if the IRS people saw fit in the future to seek additional information against that defendant—let's assume that that defendant testified before the grand jury in the prior grand jury hearing—would they have the right to have the district attorney or the strike force impanel another grand jury and again go into that same bit of information? If that defendant testified, could they use his prior testimony before the other grand jury for impeachment purposes?

Mr. SEGAL. I am a little confused. As I understand your question, once the information has been disseminated upon a proper showing to the IRS and they feel they don't have enough, can they then go back to the grand jury and crank up another grand jury to get more?

Mr. HALL. Yes.

Mr. SEGAL. I think that is a misuse of the grand jury because that makes the grand jury an arm of the IRS and I don't think it should be that way. They have effective summons procedure and should follow that.

Mr. HALL. Could they do it under what we are talking about here if this amendment goes through?

Mr. SEGAL. The language as the Court provides?

Mr. HALL. Yes.

Mr. SEGAL. I believe they probably could.

Mr. Chairman, I have a closing remark completely unrelated to that.

Mr. MANN. All right. Ms. Holtzman would like to inquire.

Ms. HOLTZMAN. Mr. Segal, what would happen if the proposed new language added by the Supreme Court were not adopted? What effect would that have?

Mr. SEGAL. I think it would be in the status quo, as Congressman Hall suggested, which I don't think is acceptable now. Administrative agencies can get a rule 6(e) order now without the benefit of an adversary proceeding to obtain grand jury information. If the proposed amendment isn't adopted with some checks, I would at least hope that this body would consider amending 6(e) to put in an adversary hearing before disclosure of grand jury proceedings to administrative agencies.

Ms. HOLTZMAN. Your concern has nothing to do with the Supreme Court's specific proposal as to who would be an attorney for the Government? Your concern is with changing the present procedures under rule 6(e), which is not really addressed by the Supreme Court in the proposed rules.

I am asking you to comment on another area within rule 6(e); namely, whether you agree or disagree with the proposal to expand the definition of the term "attorney for the Government."

Mr. SEGAL. I agree with it upon proper safeguards, which I don't believe are in the rule now. In other words, maybe this is candid evasion, but what I am trying to say is, if you are going to add attorneys for the Government to include nonlegal personnel assisting the grand jury, you should make clear that they can only assist the grand jury. They cannot use the information in any other context, and the Government must make a showing that they are necessary to assist the U.S. attorney, with the appropriate pleadings in court, and that if someone wanted grand jury proceedings to be sent to an administrative agency, you must have an adversary hearing.

Ms. HOLTZMAN. With all these safeguards, do you need the amendment to begin with?

Mr. SEGAL. I would be happy to see the amendment with all the safeguards written in, because I don't think the present rule provides adequate secrecy. You don't have that adversary proceeding required before information goes to administrative agencies.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Mr. MANN. Have the agencies taken advantage of that clause in the present rule?

Mr. SEGAL. I think there have been a number of cases where agencies have made an ex parte showing to get that information, and I would much rather have an adversary showing.

Mr. MANN. If there are no further questions, we thank you for coming.

Mr. SEGAL. Thank you, Mr. Chairman; let me just close on a personal note.

I really appreciate the opportunity to be back in this building where I started my first legal job about 12 years ago for a gentleman from Cambridge who is about six doors down the hall and now presides. We parochials in Boston believe, very effectively over this distinguished body. Thank you very much.

Mr. MANN. Thank you, Mr. Segal.

STATEMENT OF TERRY PHILIP SEGAL AND GERALD FEFFER

My name is Terry Philip Segal. I am a Boston attorney who is Counsel to the firm of Silverman & Kudisch. My practice consists mainly of civil and criminal litigation. I also teach courses in criminal procedure and trial practice at Boston College Law School. Prior to entering private practice, I spent four years as an Assistant United States Attorney for Massachusetts and the District of Columbia.

Seated next to me is Gerald Feffer, a member of the New York firm of Kostelanetz and Ritholz. Mr. Feffer specializes in the defense of white collar crimes, is a former Assistant United States Attorney for the Southern District of New York, and former Assistant Chief of that office's criminal division.

We appreciate this opportunity to give you our views about the proposed amendment to Rule 6(e). The proposed amendment has a legitimate purpose: to permit government attorneys to obtain help in grand jury proceedings from other government personnel where their expertise has been demonstrated to be required. Apart from the difficulties of delineating the type of demonstration which must be required for government attorneys to obtain help, our concern is that, as presently drafted, the 6(e) amendment could permit disclosure of grand jury proceedings to administrative agencies to assist said agencies in their own pending separate administrative investigations.

Since administrative agencies' powers of investigation are far more limited than the far ranging powers of the Grand Jury, disclosure of grand jury information to administrative agencies not only diverts the grand jury from its historic duty, but gives administrative agencies powers not specifically conferred by Congress.

Dating back to the assize of Clarendon issued by Henry II in 1166, the grand jury has always had the duty of investigating crime. Grand jury investigations have traditionally been conducted in secret. There are sound reasons for grand jury secrecy such as preventing flight, encouraging maximum disclosure by witnesses, and protecting the rights of the accused.

Grand juries have also traditionally had powers beyond any administrative agency. For example, a grand jury can initiate a general inquiry into criminal conduct without selecting a specific target. There is no requirement that evidence be relevant before the grand jury has a right to consider it. An accused is not entitled to notice of any proposed charges. A grand jury witness has no right to have counsel before the grand jury, and his testimony can be compelled by grant of immunity. Additionally, a grand jury subpoena is not subject to the same limitations as a civil summons.

In describing the grand jury's far-reaching powers, one commentator noted, "... the only justification, if any, for the grand jury's massive intrusions upon freedom and privacy is the importance society has attached to detecting criminal activity and bringing to justice those responsible."¹

On the other side of the coin, Congress and the Courts have specifically limited the tools available to administrative agencies in conducting their investigations. Agency subpoenas must pass muster under the Fourth Amendment. By statute, federal agencies are required to issue subpoenas only for evidence which is "relevant" and "material" to the inquiry. Additionally, a witness called to testify in an agency proceeding may have counsel present and may readily obtain a transcript of his testimony.

In short, to permit disclosure for use in administrative investigations makes the grand jury, presently a constitutional entity under court supervision, an instrument of an administrative agency, a branch of the executive. Such disclosure not only diverts the grand jury from its true function of investigating crime, but gives executive agencies powers not specifically conferred by Congress.

As Judge Hufstедler recently stated in *Simplot v. IRS*, slip opinion at p. 6 (9th Cir. decided November 21, 1976), a case where the Court denied IRS personnel assisting the U.S. Attorney access to grand jury material without an adversary hearing and showing of "particularized and compelling need:"

The IRS possesses a broad arsenal of investigative tools for discovering civil tax liabilities. In creating these weapons, Congress provided what it believed

¹ Note, Administrative Access To Grand Jury Materials, 75 Colum. L. Rev. 162, 177 (1975).

was necessary to protect the public fisc. Congress did not see fit to grant the IRS access to grand jury materials in criminal tax investigations.

The Advisory Committee was aware of the potential for abuse in connection with the proposed amendment to Rule 6 (e):

The court may inquire as to the good faith of the assisting personnel, to ensure that access of material is not merely subterfuge to gather evidence unattainable by means other than grand jury. Advisory Committee Note.

To make meaningful the concern expressed by us and the Advisory Committee, we suggest the first sentence of Rule 6 (e) be amended to read:

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use only in connection with any assistance they render to the grand jury. *To obtain disclosure of grand jury material for use by administrative agencies, the government, at an adversary hearing, must show particularized and compelling need.* (Proposed new language in *italic*.)

Mr. MANN. Our next witness is the Honorable Edward R. Becker, U.S. district judge for the eastern district of Pennsylvania. He has had experience with rule 6(e) and has authored opinions concerning its language.

Because of this, we welcome him and give him the opportunity to testify on the proposed amendment to that rule. It is a pleasure to welcome you today, Judge Becker. You may proceed.

TESTIMONY OF HON. EDWARD R. BECKER, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF PENNSYLVANIA

Judge BECKER. Thank you, Mr. Chairman.

I appreciate the invitation to appear before the subcommittee relative to the proposed amendments to Federal rule 6(e).

I want to make clear that the statement which I make is my own. I do not appear as a representative of the Judicial Conference of the United States. Subcommittee counsel in communicating the information to me, explained its *raison d'être*.

I entered on duty in December 1970. I have written in the last 5 years, two extensive judicial opinions about rule 6(e). I think they are the only extensive judicial opinions on the rule with the exception perhaps of Judge Hufstедler's opinion in the *Simplot* case which was referred to by Mr. Segal.

It was apparently believed that I could be of some assistance to the subcommittee in its consideration of the amendment.

In defense of the decision to invite me, I think it is also fair to say that my opinion in the case of *Grand Jury Investigation, William H. Pflaumer & Sons*¹, which recommended that rule 6(e) be clarified, was in fact, what initiated and energized the proposed amendment. The language which I suggested in the *Pflaumer* opinion is the language which has been used in the rule, but only in part and not in whole and that is one of the reasons that I wanted to be here.

This occurred, by the way, through the intervention of Judge Maris of the U.S. Court of Appeals for the Third Circuit, who was then the chairman of the Supreme Court Rules Committee and who was in the Federal courthouse in Philadelphia with me and I discussed it with him in the lobby one day. I said, "Judge Maris, I wrote this opinion, and rule 6(e) ought to be clarified," he said, "Send it to me," and it went on from there.

¹ *In re Grand Jury Investigation, William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971).

I do have, Mr. Chairman, a prepared statement, but I didn't have much notice to prepare it and last night and on the train I edited it so much that I would like leave to submit to you a final version, although if the committee likes it, I will give them the unexpurgated version here.

Mr. MANN. No, we would be delighted to extend you the additional time to prepare it.

Judge BECKER. I can do that within a few days. [See p. 47.] I think, by the way, that it is not inappropriate for a judge to appear before the subcommittee on this subject because historically the grand jury is the arm of the court. The court exercises supervisory power over the grand jury.

One of the burning issues, in my judgement, in this area is the extent to which the court should supervise the grand jury. One of the things I have advocated in my opinions is closer judicial supervision over the grand jury, and the issue, as Mr. Segal indicated, ultimately is whether it is the U.S. attorney's grand jury or the court's grand jury.

I think the real answer is that the grand jury is an independent body. I lectured a grand jury on that yesterday. I don't know how much impact I had. I told them about the Assizes of Clarendon, and I said, "You are an independent body that stands between the people and the Government, and you have the duty to exercise your independent judgment," but that is one of the things that I will come to.

I do believe that I can be of some help to the committee in view of my experience.

Now, what is the need for the proposed amendment? In its present form—well, I think the first thing to note is the title of caption of rule 6(e). Rule 6(e) reads, "The grand jury. Secrecy of proceedings or disclosure."

In its present form, for purposes relevant here, disclosure of matters occurring before the grand jury may be made to attorneys for the Government for use in the performance of their duties, but not because of the constricted definition of attorneys for the Government in rule 54(c), to other Government personnel assisting attorneys for the Government.

Rule 6(e) says attorneys for the Government, and that is defined in rule 54(c) in a very limited fashion, and it does not include other Government personnel whose assistance is required by attorneys for the Government in complex investigations. So that under the present rule if the U.S. attorney utilizes the assistance of IRS agents—and as Mr. Segal indicated he plainly needs it—they cannot have access to grand jury materials.

In cases I have had, the grand jury subpoena is for 20, 40, or 50 cartons of records. The average U.S. attorney wouldn't know what he is looking at. He needs expertise. He needs people outside the U.S. attorney's office.

Unless, of course—and I think this is an appropriate matter for the Congress and I may as well mention it now as later—if the Congress were to supply additional funds to the U.S. attorney's office so they had their own accountants and they had their own handwriting experts, et cetera, then this problem could largely be obviated.

The fact of the matter is that the attorneys for the Government are under the control of the court. They are officers of the court. They

are responsible to us. We can discipline them. We have no such control over the IRS or the Postal Service or the SEC, the independent agency aspect of this being terribly important; but I think it is important to highlight that at this time.

In any event, under present circumstances and present budgetary constraints it is obvious that the U.S. attorney has to go outside and I think under the present rule if they go outside and disclose, as they must in these complex grand jury investigations, grand jury material to IRS agents or the Postal Service, they are violating rule 6(e). They are breaching the secrecy of the grand jury.

In the *Pflaumer* case I was confronted with a complex tax investigation. This is a case in which I filed back the opinion in 1971 in which I suggested the rule be changed. They subpoenaed cartons, Lord knows how many cartons of financial records before the grand jury pursuant to subpoena.

The assistant U.S. attorney didn't know anything about analyzing tax records. They came to me and drew my card. I was the judge to whom the case was assigned, because there was a motion for a protective order by the party being investigated.

What happened was that the records were subpoenaed. It was disclosed that IRS agents were going to look at the records so the attorney for the individual under investigation moved for a protective order.

He wanted no disclosure to the IRS agents. At that point I demanded from the Government a showing that they needed technical assistance. That is not required by this rule.

This rule makes it automatic that anybody who they want to have help them can help them. As will appear, I am not so sure that you ought to implicate the judges every step of the way of it; this is a very complex area and potentially a very onerous area.

One of the problems vis-a-vis the extent of judicial supervision is the workload of Federal judges.

One case may take me 8 months to try. You often get a complex anti-trust case, and given range the whole case load there is some reluctance on the part of Federal judges to involve themselves.

I, however, think that they can and should be involved more in grand jury supervision. In any event, in *Pflaumer* I denied the motion for a protective order. I held that access to the grand jury material should be afforded the IRS agents so as to permit them to assist attorneys for the Government in the performance of their duties.

I felt then and I feel now that the increasing complexity of grand jury investigation which often involves analysis of huge quantities of books and records which can meaningfully only be reviewed by IRS men or by an SEC man or a labor man or what have you, supports the Government's position favoring access to grand jury records by government personnel assisting attorneys for the Government in performance of their duties.

The *Pflaumer* opinion, which as I say has been widely followed, represents now the prevailing case law. I think therefore that the change is in order.

But my problem with the change is that it does not go far enough in providing safeguards against potential grand jury abuse. Put differently, I support the amendment as far as it goes, and it does use the

language that I used in the *Pflaumer* opinion, but I think it goes too far.

I next intended to address the matter of safeguards in terms of background, but I think it would be helpful for the committee to know now specifically what I have in mind.

In the *Pflaumer* case I permitted IRS access to materials subpoenaed before the grand jury, provided that the subpoenaed material was to remain at all times under the aegis of attorneys for the Government.

I placed that limitation. I think the principal thrust of my remarks is that what is missing from the rule as it has been drafted by the committee, is the aegis requirement or some similar requirement that disclosure may be made to a government person assisting attorneys for the Government in performance of their duties, so long as the material remains at all times under the aegis of attorneys for the Government.

I think I looked up "aegis". I guess I did when I wrote the opinion. And I looked it up again the other day. Webster defines it as protection, defense, controlling or conditioning influence, guidance or direction.

The United States attorney is an officer of the court. I think that the aegis requirement can be infused with considerable meaning in a variety of ways.

One way is by internal procedures adopted by the U.S. attorney, and in my district, the eastern district of Pennsylvania, the U.S. attorney has adopted extensive internal procedures.

I think it is fair to say that those procedures were adopted in the omnipresence of the second opinion which I mentioned, the *Hawthorne*¹ opinion, in which I laid down very strict rules as to what the U.S. attorney must do to protect the secrecy of grand jury material.

Judge Hufstедler in the *Simplot*² opinion recommended that those *Hawthorne* procedures be considered. For my part, I prefer self-imposed regulations by the U.S. attorney and in my district, to repeat, they have an excellent set of rules.

These were submitted to me in camera. They require segregation of the grand jury material. That is one of the things I required in *Hawthorne*. If it goes to IRS or if it goes to SEC, segregation of the material, of the grand jury material, from general agency files is required. They also require instructions to the agents that this is secret grand jury material, so earmarked.

I also suggested in *Hawthorne* that an oath be administered to the agent. The internal rules in our district—and I think they are super rules—have a very detailed housekeeping setup where everything is marked and docketed with control numbers and so on.

So in the event of a claim of abuse later on the judge who is confronted with a contention of abuse can meaningfully adjudicate that claim because there is a record of who got what.

I also required them in *Hawthorne* to disclose what agency personnel had access to the grand jury material.

¹ *Robert Hawthorne, Inc. v. Director of Internal Revenue Service*, 406 F. Supp. 1098, (E. D. Pa. 1975).

² *J. R. Simplot Co. v. United States District Court for the District of Idaho*, Nos. 76-1893, 76-1995 (9th Cir., filed Nov. 12, 1976).

The U.S. attorney's present instructions in my district are to notify each agency that this is secret grand jury material that may not be disclosed to anybody without their authorization and so on.

I also required them to file a certificate when the agency is through with the material. I required them to keep an in-house document which their internal rules themselves provide for.

Now, the reason I think that self-imposed rules are better is that if you have a court-imposed rule which is really in pursuance of the court's supervisory power over the grand jury, you could get into a situation where somebody is indicted and they then contend that there was some breach of the court rule.

You get a bunch of motions for protection order and to dismiss in connection with a criminal prosecution. You get the mini-trials that the U.S. Supreme Court in the *Dionisio* case¹ counseled against in connection with a grand jury proceeding.

So I think it is better that they be internally imposed.

But the aegis requirement, if written into the rule, would give the court the power to impose such regulation, self-regulation by the U.S. attorney or internal housekeeping procedures so as to preserve the secrecy of the grand jury.

Now, I think it is helpful to make some preliminary comments about the need for safeguards, about the nature of the grand jury, the scope of its investigative powers, the role of the prosecutor and the court and the policy of grand jury secrecy.

In my prepared statement I cite from the *Calandra*² case and I won't burden the committee with that. There Justice Powell cites succinctly the history of the grand jury, its latitude in investigation, its role as an independent body.

It monitors its proceedings and proceeds in secret and it alone determines the course of its inquiry. The Supreme Court has made clear in recent years that the grand jury has an obligation to conduct a thorough and an extensive investigation, to run down every clue, examine every witness, and indeed it does.

In this day and age, without the tool of the grand jury, it is difficult for the prosecutor to ferret out a complex criminal conspiracy. The grand jury is an invaluable and a very important tool, and the Supreme Court has made that very clear.

The courts have certainly accepted the fact that it is the prosecutor who provides the initiative, who provides the impetus for a grand jury investigation.

On the other hand, historically the grand jury is an arm of the court. The power to call the grand jury into existence is the district court's power under the United States Code. The district court has the power to issue and the duty to enforce grand jury subpoenas. Only the district judges can do that. And it is settled that the district court has supervisory power over the grand jury and that a broad range of devices are available to the district court in resolving challenges to the propriety of the grand jury process.

Federal courts have the jurisdiction to quash an unreasonable Federal grand jury subpoena. It is plain that the district courts have the

¹ *United States v. Dionisio*, 410 U.S. 1 (1973).

² *United States v. Calandra*, 414 U.S. 338 (1973).

supervisory power over the grand jury and the power to grant relief from any form of abuse.

There is, as I said, a tension between the role of the prosecutor and the role of the court. In my judgment, while the courts have recognized the role of the prosecutor in directing proceedings of the grand jury and subpoenaing witnesses and being the fearless leader, as it were, in its proceedings, I think the principle must remain that the court is the one with ultimate responsibility, and it is our duty to supervise the grand jury.

Now, the other area that I would like to note preliminarily is the policy of secrecy. The policy of secrecy surrounding grand jury investigations reaches far back into the history of that institution. The reasons for the policy are generally considered the following: First, to prevent the escape of those whose indictment may be contemplated; second, to insure the utmost freedom to the grand jury in its deliberations and to prevent persons subject to indictment or their friends from importuning the grand jury; third, to prevent subornation of perjury or tampering with a witness who may later testify; fourth, to encourage free and untrammelled disclosure by persons who have information with respect to the commission of crimes; and, fifth, and I think most important, at least for the committee's consideration today, to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. That in my judgment is an extremely important consideration.

As I have indicated, in the *Pfauver* opinion I imposed the aegis requirement. The fact of the matter is that when a citizen turns his cartons of papers over to the grand jury they will be in the ordinary course examined by government personnel in the offices of their own agency.

Again, we must remember that the only reason they got this material was that it was subpoenaed by the grand jury. That agency does not have any subpoena power. The grand jury has extraordinary powers and these records get into the hands of the agency as a result of a subpoena.

Now, in terms of the congressional scheme—let me just talk about administrative agencies for a minute, like the IRS or the SEC.

My colleague Judge Higginbotham in the Delphi Capital case followed the *Pfauver* rule in the investigation where the U.S. attorney needed SEC assistance. In terms of the congressional scheme, the power of Federal administrative agencies has been tightly circumscribed by the Congress by the statutes which create them.

Federal agencies are not permitted to launch general investigations which do not concentrate on a specific target. Agency subpoenas are subject to greater scrutiny than grand jury subpoenas. The agencies are not usually subject to the direct supervision of the court.

And, finally, the activities of the agencies, unlike those of the U.S. attorney in connection with a given prosecution, are ongoing, so that vindication at trial does not serve as a meaningful protection in cases of abuse.

The Congress then has determined not to give administrative agencies powers comparable to the grand jury. Yet the danger exists that

the agency may accede to the grand jury's extraordinary powers via rule 6(e). That was a subject I discussed in the *Hawthorne* opinion, which is the second opinion I wrote on the subject.

Now, the conclusion that I draw vis-a-vis the drafting of this rule is that to permit personnel assisting attorneys for the Government to have unfettered access to grand jury material could lead to a number of kinds of abuse. It could lead to improper access that I have referred to and possible public disclosure, because in terms of disclosure there is a problem today, because of the pervasiveness of the media, and an agent—when there are grand jury leaks. There always have been and I guess there always will be, and everybody gets very up-tight about grand jury leaks, and you try to track them down, and it is pretty hard to track them down.

My guess is that when there are grand jury leaks they are usually not from the U.S. attorney's office.

Although defense counsel don't like to admit it, very often they are from the witness or people on the side of those who are being investigated, but they may also be from the agency itself, so there is that danger of leaking.

Now, if the new rule goes into effect as it is presently written, which simply says that access may be given to those government personnel assisting attorneys for the Government in the performance of their duties without any safeguard, without any aegis requirement or limitation requirement, then prosecutors might justifiably conclude that the grand jury is the arm of the prosecutor and that they have been given free rein in sharing information obtained under the compulsion of the grand jury subpoena with any government agency which in their sole discretion they believe could assist them in the performance of their duties.

The aegis requirement at least vests in a responsible officer of the court, the United States Attorney, the responsibility of safeguarding the secrecy of grand jury material.

I strongly commend the aegis requirement to you as a potential amendment to the amendment. I suggest that there be a proviso to the amended rule which would be, "Provided, however, that where access to grand jury material is afforded to government personnel assisting the attorneys for the Government in the performance of their duties, such material shall remain under the aegis of the attorneys for the Government."

Now, is the aegis requirement meaningful? I think it is. I think there are three potential ways of implementing an aegis requirement.

First of all, there is the way I have mentioned, voluntary adoption of internal procedures by the U.S. attorney: Setting up housekeeping procedures, instructions to the agency stamped "Confidential," grand jury material, et cetera.

The second way is if the court required the United States Attorney to do that. In our district they have done it voluntarily.

Third, there could be the requirement—and again, this could be put in a rule, and this is what Mr. Segal referred to—the requirement that the U.S. attorney apply for a 6(c) order every time he wants to use assistance of outside agency personnel.

Now, that creates some problems, as I will come to in a minute. But that is a possibility. I think if the committee wants to consider that, you have to consider types of cases.

Let me mention it now. Let's contrast a simple mail fraud use, where somebody fraudulently obtained and used credit cards and the mail in connection therewith, or transportation of checks or something, and all the Government wants is a handwriting exemplar, so they send a man to get a handwriting exemplar.

But they need a Postal Service handwriting inspector. They give him access to the grand jury material. What is the grand jury material? The handwriting exemplar that the person has been subpoenaed to give, because they want to compare it to the signature on the check or the credit card application. So all they need is an FBI or a Treasury Department handwriting expert or a Postal Service handwriting expert to analyze the exemplars. That is all you are dealing with.

Now, that is assistance from somebody outside the Justice Department. You are giving them access to grand jury material.

Now, perhaps the Justice Department could find enough room in their budget to hire handwriting experts or fingerprint experts—but, if the Federal judges had to sign 6(e) orders in every such application, it might be somewhat burdensome. I think it is "do-able," but it might be burdensome.

On the other hand, take a more complex investigation where you are going to give a ton of records to the IRS or the SEC and they are going to have it. They are an investigative agency with ongoing surveillance over a given subject.

In that case, maybe there ought to be a 6(e) order. But in any event, the third way of meaningfully enforcing the aegis requirement would be if you required in the rule that the U.S. attorney apply for a 6(e) order in every case, or at least in certain kinds of cases.

And other advantage of the aegis requirement is that it gives the courts the opportunity to perform their historical role of construction. What does the aegis requirement mean? It may mean one thing in one case and something else in a different kind of case. The courts can construe.

I know Mr. Segal discussed the notion of adversary hearings. The usual procedure is an ex parte procedure, as he suggested. They want a 6(e) order and they come to me and I sign a 6(e) order, and I docket it in camera. And that is another subject which if the committee is interested I will come to, because the problem of grand jury secrecy is broader than just 6(e).

I did this in the *Pflaumer* case, and the judge in his discretion, depending on the situation, can convert it into an adversary hearing. I have done it in rare cases, but where it looked like there was going to be an extensive investigation I said "Who are you investigating? Who is his counsel? Bring them in."

Then I hold the in camera hearing and I say, "OK, they have given me affidavits as to why they need assistance. It looks to me adequate, but you have an opportunity to be heard."

So there is that authority which is vested in the judge. I did it before there was any rule change, but I think there is a need, for

reasons I have pointed out before, for a rule change and there is need for safeguards.

In any event, in my *Hawthorne* opinion, which will be in my formal presentation, the committee can look at the housekeeping system which I imposed. I ordered them to segregate the records, administer oaths to agency personnel who had access to grand jury material, and so on.

On the other hand, as I have said, the rules could require that a 6(e) order be applied for, and if a 6(e) order were applied for, then the court could tailor the requirements to the needs of the situation.

Now, one thing which the committee might consider, and this is something that Mr. Segal also touched on, is the desirability of requiring a 6(e) order to be applied for to the judge so as to satisfy the court that you need the assistance.

Mr. Segal's view, as I understand it, is that the Government ought to have to demonstrate that they need the IRS or the SEC. This isn't a simple area, because of the variety of situations in which it can arise.

I will say this, that in my district all of the 6(e) orders, or most of the 6(e) orders, have been in IRS cases. We have them in IRS cases because the IRS has requested the 6(e) order for its own protection.

When you are dealing with agency access, the problem is not the problem of later criminal prosecutions, but the problem of later civil use. The agencies feel that if they have a 6(e) order, they are protected against claim of abuse in the event they later use the information civilly.

In response to a question posed about the question of later civil use, the case law in that area, which includes the 1956 grand jury case which Mr. Segal referred to, the seventh circuit case, and my *Pflaumer* case, have made the availability of later civil use by the agency turn on the question of bad faith in pursuing a grand jury investigation.

If the court finds that the grand jury investigation was really a subterfuge to obtain this information for the agency or for civil use, then the court has the power to say, "You can't use it civilly. You can't proceed against this individual."

On the other hand, if the court finds that there was no bad faith, then they can use it civilly. There are investigations such as the one Mr. Segal described where they pursue a criminal tax investigation with the aid of the IRS.

If the investigation was in good faith or for a valid criminal purpose and it doesn't turn up in the final analysis sufficient evidence of criminality, I think the prevailing case law is that it can be used civilly, if there was no bad faith.

But the importance of the aegis requirement and the housekeeping requirement that I have imposed is that it at least would establish a record, so that later on when the taxpayer came in and said, "Hey, this whole grand jury investigation was a subterfuge. They didn't have anything against me criminally, but just wanted to get me civilly on my taxes." at least there would be internal housekeeping records which would show who had access to the materials, which agents, which supervisors, when they got it, when it was returned, and then there would be a meaningful record for the district court to review a claim of abuse.

So, as I say, I think it is important to keep in mind that central to this inquiry is the issue of whether the agency later can use this material civilly, and the advantage of the aegis requirement is that it would make a record so that the judge could meaningfully determine that issue.

Now, the suggestion I made in the *Hawthorne* case is that a 6(e) order should only be required whenever the technical assistance—and I use that term advisedly—of the IRS or a similarly situated agency outside the Justice Department is to be utilized in connection with a grand jury investigation, except with cases where the assistance is of minor proportions of the single-instance variety, such as the utilization of Postal Service or Secret Service expertise in evaluating handwriting exemplars and that kind of thing.

There might be an exception of agencies within the Justice Department, because they are under the control of the U.S. attorney, who is under the control of the court.

They are not, as is IRS or SEC, a separate agency, subject to the strictures of the Congress limiting their powers of subpoena and their powers of investigation.

In my judgment, the classical case for application of the 6(e) order is for the IRS or SEC or some other agency, where it has a continuing regulatory or oversight responsibility with respect to the activities of an individual or corporation, and the use and retention of grand jury material beyond the aegis of the U.S. attorney would breach the secrecy of the grand jury and pervert the grand jury process.

The only reservation, to repeat, that I have about requiring a 6(e) order in every case is that in some of these minor cases you have got to go to the court all the time. The courts have, of course, other considerable burdens.

I do believe, however, that it is preferable if the Justice Department would adopt its own internal rules, because of the desirability of avoiding minitrials and motions in criminal cases.

There are only two other thoughts which I had with respect to the drafting of the revised rule. First, it might be well to denote that the assistance rendered by the Government personnel is to the grand jury rather than to the attorneys for the Government, because that is the true state of affairs. They are assisting the grand jury, really.

Perhaps there should be added the express limitation that the access of the other Government personnel is restricted to performing their duties in providing necessary assistance to the grand jury at its request.

In sum, the amendments to the rule on secrecy would do well to emphasize the independence of the grand jury in its role as the arm of the court and the responsibility of the United States attorney to preserve its secrecy.

I would say that I am self-conscious of the fact that I appear here as a judge and not as an advocate of any position, except, I suppose, that which I have espoused in my own opinions, which I guess legitimizes my remarks. But I do feel because of the oversight which the court has over the grand jury that we have responsibility to develop a workable rule.

Now, I did in my prepared remarks have some thoughts on a related subject relative to grand jury secrecy. It is headed "Protection of Grand Jury Secrecy as Affected by Legal Protection Ancillary to Grand Jury Investigations."

Whenever you get a grand jury investigation and somebody is subpoenaed, you get ancillary proceedings. The fellow gets subpoenaed, and moves to quash or limit or modify the grand jury subpoena. The Government moves to enforce the grand jury subpoena. Somebody moves for a protective order, et cetera.

Now, the Supreme Court, particularly in this amendment, does not deal with this subject. That is, it does not deal with the protection of grand jury secrecy as affected by such ancillary legal proceedings.

However, in view of the fact that the title of rule 6(e) is "Grand Jury Secrecy and Disclosure," and in view of the importance of that policy, I am sure, to the members of the committee in their personal role as lawyers and in their official role—I took the liberty of calling to the order of the subcommittee a local rule which my court recently adopted relating to that matter; that is, preserving the secrecy of the grand jury against public disclosure of internal grand jury material which appears when somebody files a motion to quash.

Somebody files a motion to quash and says, "I move to quash this subpoena, because this is an abusive investigation." And they have to identify themselves and the subject matter of the investigation, and if that is filed in the public documents available to the media, then the secrecy of the grand jury can be breached.

I think I can tell you recently what our court has done. I don't know whether that is within the charter of this subcommittee or the purview of your deliberations.

It is gratuitous, but since our court has recently adopted a rule, and since I was asked to testify about grand jury secrecy, if the committee—if the committee is interested—I will leave that to the committee.

Mr. MANN. If you will, briefly, that will be fine.

Judge BECKER. The former practice in our district was that these motions be filed under the miscellaneous docket and a part of the public record.

Whenever a grand jury was investigating an individual, his records were subpoenaed, and in some cases I have asked the U.S. attorney what percentage—I don't know, 10, 20, 30 percent—the individual was never indicted, and yet as a result of the media having access to the public docket there were full-scale reports in the media that so-and-so is being investigated for this and that reason, his records were subpoenaed, the individual was identified and the nature of the investigation was identified.

Now, what we did in our district was to pass this local rule which provided that neither the Government nor any moving party shall disclose in any affidavit, motion, or other paper filed in the public record nor in the caption the identity of the witness or person under investigation, any specific grand jury investigative area other than of himself, herself or itself, unless in camera and under seal.

And there are certain other limitations and qualifications and exceptions. But by and large this burden was imposed on attorneys for the Government and upon anybody else moving.

What it did was to preserve the secrecy of the proceedings of the grand jury. Frankly, after we passed it I thought we were going to get all kinds of howls from the media. It was interesting to note that one of the Philadelphia daily newspapers wrote a story after we adopted an article which said, "It is too late for action," and why.

I won't breach grand jury secrecy, even though it was breached, by mentioning their names.

A loophole in secrecy provisions enabled reporters to fully document the tug of war between Federal grand juries and x and y.

While it was assumed that the term "grand jury" carried a connotation of secrecy, the secrecy had been limited and fragile—a drop of cheesecloth rather than a shutter of steel.

Until U.S. District Court judges changed their procedural rules this week, all a public official had to do to unintentionally reveal he was the subject of a Federal investigation was file a related legal motion—such as a motion to quash a subpoena. A prosecutor's motion would have the same effect.

Those motions were considered public documents and were reported by the press. Under the new rules, those motions will get the same protection given actual grand jury testimony by being filed secretly.

Despite the traditional secret nature of a grand jury investigation, all motions arising from the Federal grand jury were considered public record. They were fair grist for a reporter's notebook and open to public scrutiny.

Then it goes on to say how the details were thus disclosed. It says: "In tightening their secrecy, the Federal judges may have taken a lead from State grand jury procedure in Philadelphia," which also provided for filings in camera.

The docketing procedure varies from district to district throughout the country. I understand there are some districts where it is under seal or the clerk immediately sends it to the judge and it is held under seal, and there are some districts where it is exposed to public view. Well, in this area our court did take a role in protecting grand jury secrecy, and we think this rule has worked well, and has had general acceptance. To the extent that the subcommittee is in general terms interested in grand jury secrecy, I simply commend this rule to the committee's attention.

Now, it may be that it should be a subject of local practice. I suspect that there are many areas where it is not a problem. It may be that it is a matter for the Rules Committee to address in the first instance, but since I was here and since I was invited by the committee to testify about grand jury secrecy, and since our court had recently adopted this, I thought it might be helpful or useful to the committee if I would call it to their attention, and hence I have done so.

That concludes my presentation, Mr. Chairman.

Mr. MANN. Thank you very much.

Ms. Holtzman?

Ms. HOLTZMAN. Thank you very much, Judge Becker, for your enlightening testimony.

Let me give you one very good precedent for your testimony. Judge Friendly was here to testify. I think other judges have testified in the past as well.

Judge BECKER. I am honored by the allusion, Ms. Holtzman.

Ms. HOLTZMAN. Let me ask you a question that counsel has brought to my attention. It is possible there may be an unintentional corollary to the proposed amendment. By changing the definition of "attorney

for the Government," it may now be possible for IRS agents or SEC agents to sit in when the grand jury hears a witness.

Is that something that is desirable?

Judge BECKER. That is certainly not desirable. I don't think that the amendment accomplishes that. The amendment says "disclosure of matters occurring before the grand jury." It talks about to whom disclosure may be made. I don't have the rules here.

I think there is another subdivision of rule 6 which says who can be in the grand jury.

Ms. HOLTZMAN. That is right. Subsection d of rule 6 says who may be present. It says attorneys for the Government, the witness under examination, and so forth may be present while the grand jury is in session.

Judge BECKER. I think that ought to be clarified.

Ms. HOLTZMAN. It would be your opinion that it would be undesirable to have IRS agents, handwriting experts, SEC personnel and the like in the grand jury room.

Judge BECKER. I think they should not be permitted in the grand jury room.

Ms. HOLTZMAN. And that ought to be clarified.

Judge BECKER. I think it should.

Ms. HOLTZMAN. Thank you.

Is it your opinion that, excluding minor requests for assistance, like handwriting experts, you would think that it is a preferable course for U.S. attorneys apply for a 6(e) order?

Judge BECKER. I think if the U.S. attorney did not have suitable internal procedures that it would be a desirable course to apply for 6(e) orders.

Ms. HOLTZMAN. But if there were internal procedures, you would say that there should not be an application unless somehow the judge, at his own instance, wished to have the U.S. attorney explain—

Judge BECKER. I think the judge always could do that by virtue of my views as to the relationship between the court and the grand jury. The court charges the grand jury when they are first empaneled.

Ms. HOLTZMAN. I have no further questions, Mr. Chairman.

Mr. MANN. Thank you, Ms. Holtzman.

Mr. Hyde?

Mr. HYDE. I have no questions except to thank Judge Becker for a very illuminating statement.

Mr. MANN. Mr. Hall?

Mr. HALL. Judge Becker, there are two reasons I appreciate very much your being here. One is the very fine way in which you have presented this.

Second, for over 25 years, I have always wanted to sit higher than a Federal judge and ask him some questions. In my experience, it has always been the opposite posture.

There are one or two things I would like to ask you for clarification. One of them is something that Ms. Holtzman mentioned.

In looking at the language of the new amendment, for purposes of this subdivision, attorneys for the Government include those enumerated in rule 54(c). It also includes such other Government personnel as are necessary to assist the attorneys for the Government in the performance of their duties.

Does that mean both inside the grand jury room and outside the grand jury room?

Judge BECKER. I don't think it was meant to mean inside the grand jury room. I think it was just meant to mean outside the grand jury room. I say that in terms of its history.

This language emanated from the opinion I wrote in the *Pflaumer* case and that is all I was concerned about, and that is all the other cases which followed it were concerned about.

But I think that by virtue of the juxtaposition of (e) and (b) or whatever it is that it needs to be clarified and that it should be made crystal clear that these people cannot be inside the grand jury room.

The purpose, as I understand—the purpose of the amendment is to permit analysis and evaluation of material which is subpoenaed to the grand jury, and that is outside the grand jury room.

Mr. HALL. You mentioned a moment ago in certain cases that it would be advantageous if the Federal Government had handwriting experts and that sort of thing.

It has always been my experience that when they needed professional expert testimony they had it available. I remember a case that I was once involved in representing a defendant on an importation of parrots in this country which, of course, brings up the parrot fever.

They brought an expert from Washington, from the Smithsonian, who was an expert on parrots. That man went into the grand jury room and helped the Government in their presentation of the case. He also testified in court.

Now, that is not an individual that we are talking about here, merely because he came in and testified. If he raised up some other issue in the course of his testimony, it is not your statement that that person or the parties for whom he testified would have the right to grand jury testimony, is it, sir?

Judge BECKER. Well, I think we have to make a distinction as between before and after the indictment. After the indictment, I think it's another ballgame. The Government has what evidence has been developed. If at that point he is analyzing Government evidence which is available to the defendant under the criminal discovery rules, I don't think that is a problem.

I think if we are talking about the grand jury phase or the grand jury stage, if this individual from the Smithsonian has access to grand jury material—I don't know whether the parrot would be a grand jury item, but we are talking about books and records and that kind of thing—I think if he has access to it, he is subject to the secrecy limitations.

With your permission, I must say in fairness to the Government's position that this is a complex subject. The strike force in my district has railed against an order, a 6(e) order, that I imposed with these housekeeping procedures. They have taken the position that in some respects it is difficult to monitor these things.

Let's say the—let's leave aside the documents, which are really the biggest problem. I think they are easy. They are in one place and you can keep track of who is looking at them. But if the grand jury investigation develops a lead or a tip, and the Government is investigating

following through this lead or tip, they give it to an agent here or there.

Now, what the Government cited to me was the *Patty Hearst* case. They said in the *Patty Hearst* case, what happened to Patty Hearst? We had people in 50 States looking for Patty Hearst and the information which was developed in the grand jury by word of mouth was transmitted from one to the other to the other to the other.

Now, I think that the *Patty Hearst* case may be the exception which proves the rule. There are some cases where it is very difficult to monitor with respect to monitoring housekeeping.

I think the parrot case, which is a discrete, narrow area where you have one expert, I think if he is evaluating grand jury material, he is subject to the secrecy rule.

If he is on the Justice Department's payroll, then I think it may be something else. But if he is an outside individual and he is given access to secret material, then I think he has to be subject to the grand jury rule, and I think the monitoring of it, while it may be difficult in some cases, is something that the Justice Department is capable of handling.

Mr. HALL. Can you envision any circumstance where anyone other than Federal Government agencies should be allowed to have this testimony, such as a State agency, a State government investigative agency that may help the Federal people in some way in preparing grand jury testimony?

Do you envision whether they may be able to come in under 6(c) and get access to this information? And would it be proper, in your opinion?

Judge BECKER. This depends on whether the grand jury investigation is over or continuing. There is another whole area of cases with respect to access to an investigation after the grand jury investigation has concluded.

It has concluded with an indictment or with no indictment. Very often, what you get is application by the State people to turn it over where no Federal crime has been disclosed, but where there may be some potential State prosecution. I think that is easier after it is over, after the grand jury investigation—the Federal grand jury investigation is over.

I think there are cases where subject to the control of the court and the permission of the court, grand jury material can and should be turned over to State investigating agencies.

I think while the Federal grand jury investigation is ongoing, the circumstances when that might occur would be exceedingly rare.

I am not going to suggest that there may not be proper cases, because I may have somebody come in to me tomorrow with an application which might persuade me, but I would think they would be rare.

I think the kind of thing you are talking about, Congressman Hall, would be more common after the Federal grand jury investigation has concluded.

Mr. HALL. I have a letter here, which all the committee has, from the associate professor of law at the University of North Carolina, written May 25, 1976, which states with reference to this rule 6(c), "I do believe, however, that the defense should have equal access to the

evidence before the grand jury as is provided for its adversary, at least after the indictment and the arrest of the accused."

And he says to see a certain article.

Can you envision where the defendant or his attorneys, even if there is no application made by the Government or some agency working with the government makes an application—where the defendant could come in and file a motion under 6(e) and get access to that grand jury testimony?

Judge BECKER. Congressman Hall, let me answer your question in a somewhat oblique way. I think that is a totally different problem coming under the umbrella of a totally different rule, namely the Federal criminal discovery rules.

After somebody is indicted, then what comes into play are the Federal criminal discovery rules. I think it is rule 16. And there are various local rules as to what the defendant is entitled to.

Now, with the recent amendment to the Federal criminal discovery rules, he is entitled to a lot more than he used to be, and some of the cited cases are giving him still more in terms of their interpretation of the rule.

But mainly, the criminal discovery rules haven't gone the whole way that the civil discovery rules have gone, and by and large, other than the statement of the defendant and scientific evidence and that kind of thing, they are not entitled access to grand jury material in the absence of a showing of particularized need. The particularized need standard remains subject to judicial discretion, and I think the particularized need standard is probably adequate.

But to repeat, I think that is a matter for consideration in connection with the criminal discovery rules rather than rule 6(e), because at that point, it is after an indictment where the defendant is entitled to a public trial and so forth.

Mr. HALL. You say the strike force is against this proposed proposition that we are talking about?

Judge BECKER. I certainly can't speak for the strike force, Mr. Thornburgh presumably could. This is just one local—I will say that the local strike force in the eastern district of Pennsylvania, which is Philadelphia, and nine surrounding counties in southeastern Pennsylvania—has informed me that they are committed to the proposition of developing internal rules much as the U.S. attorney has.

To repeat, they are salutary, first-rate rules, and I would commend them to the Justice Department for consideration elsewhere. They have said that they are committed to adopting internal rules which would say, for instance, approximate the structures of Hawthorne, but they pointed out the limitations on their ability to control the dissemination of grand jury investigation in certain complex cases, and I think there are certain problems.

There are two sides to this story, like most stories.

Mr. HALL. One question that you may not be able to answer and that may be outside of the scope, Mr. Chairman, is there a regulation now which prohibits an IRS agent in his investigation of some case from working with State and local officers in the promulgation of getting evidence or working on that case?

Judge BECKER. I think if we are not talking about a grand jury context, an investigator can talk to whomever he wants and can seek

information from wherever he can find it, including from State and local officials.

I think there is no—unless there is some internal IRS regulation. But I don't speak with any authority on that, Congressman.

Mr. HALL. All right.

Mr. MANN. Mr. Evans.

Mr. EVANS. Judge, I appreciate your being here, too. I have always wanted to meet a Philadelphia lawyer and I am properly impressed. I appreciate the way you run your court. I think the emphasis you have placed on individual liberty and freedom and procedures that protect that individual freedom has been evidenced by the procedures you have set up in your court and the decisions you have rendered.

I do have a couple of questions which involved the privacy of the grand jury.

First, is it your understanding of the law that the very fact of a grand jury investigation of a particular individual is subject to the same secrecy? Is that individual entitled to keep the secret that he is being investigated until such time—

Judge BECKER. Congressman Evans, that is a difficult question. Certainly there is nothing to stop anybody from the media or elsewhere from stationing themselves outside the grand jury room and seeing who comes in to testify. There shouldn't be any restriction or limitation. Justice Powell in the *Calandra* case talked about the burdens of being citizens and the burdens of appearing and having it known that you appeared, that that must give way to the overriding need for a thorough grand jury investigation.

I think the important thing to protect is not so much the identity of an individual appearing before the grand jury, although our local rule does protect that, but disclosure as to the subject matter. Grand jury investigation evidence.

Mr. EVANS. This was my question, the subject matter and the person who may be being investigated.

Judge BECKER. That's right, the subject or maybe the target. That's a term of art in recent cases as to when you become a target and when you have to be warned. Let's simply call it a subject or a potential target. What is entitled to protection is the fact that someone is the subject or a potential target and the subject matter of the inquiry, not merely the fact that he or she appears before the grand jury.

Mr. EVANS. Under the present law, is there any punishment for anyone revealing the nature of a grand jury investigation prior to any final determination, and if not should there be?

Judge BECKER. Congressman Evans, I know of precious few people who have ever leaked grand jury material who ever got caught. It's a very difficult thing to lay your hand on, but I believe that the court has the inherent power to proceed by way of contempt against anyone who willfully breaches the secrecy of the grand jury. I'm sure there must be some reported cases on it and I have known of proceedings where I think there have been—I think there have been some in our court—where there was a leak from the grand jury and the prosecutors in our district have been very concerned about it and very properly so.

Everybody is concerned about it and you look into it and try to find who did it; but you never do.

I do not think, however, that it's necessary that there be an express statute on it. I think the court's inherent power and its control over grand jury proceedings would be sufficient to enable it to handle that.

Mr. EVANS. Judge, I was going to ask you if you felt that there was any justification or any time that the findings of the grand jury should be released for use to a civil agency for civil purposes or administrative purposes in a civil action. I think you answered that when you stated that you made a distinguishing factor of bad faith.

Now, my question must be this. With the nature of a grand jury proceeding being such as it is and with it carrying not only the greater subpoena powers and the greater investigative powers that it carries and also the pressure that it must carry by virtue of any individual being summoned to appear before a grand jury, can there really be any justification ever to release this information to an administrative agency for civil purposes?

Judge BECKER. Well, the case law, Congressman Evans, reports the view that if the Government has acted in good faith and has developed all of this evidence, at the conclusion of the grand jury investigation, that it's proper to release it to other agencies for civil purposes.

In the *Pfauver* opinion I held that this could be done so long as there was no bad faith. I think that if the Government is held to toe the line carefully and if a good housekeeping record is developed such as I think can be done under the aegis rule, under the proposed amendment which I have suggested, so that the judge has a meaningful record to determine whether there has been bad faith, then I think if the court finds that there has been no bad faith that it's not inappropriate that the material ultimately be used for civil purposes.

But that's a policy judgment that I think can be argued either way. I think it's essentially a policy judgment rather than a judicial judgment.

Mr. EVANS. But you don't think it's a judicial judgment that the findings of a grand jury can be used in a civil matter? Does that satisfy the question in your mind, whether or not it was done in bad faith? Obviously, it does because you have rendered an opinion in that manner.

Judge BECKER. Foolish consistency is the hobgoblin of little minds, Congressman Evans.

Mr. EVANS. But can there really be a justification where you have a differentiation between a grand jury investigation set up to investigate criminal matters and a civil proceeding in which a person is not subject to the same kind of investigation and subpoena powers?

Excuse me, Judge, if I might just pursue this. Because the Government proceeds in good faith on what they thought was a criminal matter and it turned out it wasn't and there was no justification, then by your decisions or by the decisions that have been rendered you can make a differentiation between that and a situation in which it was proceeding in bad faith?

Judge BECKER. Congressman Evans, I concede it's a close question. My judgment is that if there were good faith in connection with a criminal investigation that the Government should be permitted to use the—should be permitted to disclose it later on, and there is a fair amount of authority in that field.

But, to repeat, I could see it going the other way as well. I have given you my view but I can understand the other view.

Mr. EVANS. Thank you, Mr. Chairman.

Mr. MANN. Mr. Gudger.

Mr. GUDGER. Mr. Chairman, I had only one question of Judge Becker. I apologize that I had to be at another meeting, Mr. Chairman. It was one of these things that cannot be avoided.

Judge BECKER. I see the material which you have supplied here. I have scanned it since I arrived. I see that it relates largely to investigative grand juries as distinguished from grand juries acting upon indictment.

In the indictment process under the Federal system which we are addressing, of course the district attorney goes in and develops by questioning the evidence which he seeks to present to the grand jury. Have you commented upon the secrecy of that transcript as well as the secrecy of the transcript in the investigative grand jury, and if you have, would you give me the benefit of that observation?

Judge BECKER. Congressman Gudger, I really haven't made any distinction because it's one and the same grand jury in the Federal system that investigates and that indicts.

Now, I know in the State system in Pennsylvania there is such an animal as an investigating grand jury. The regular grand jury is only an indicting grand jury. The federal system is not that way and my comments would apply to both.

Mr. GUDGER. I forgot that was the case. This prompts one other question.

Judge Becker, I come from the State of North Carolina, in which there is total secrecy and the district attorney cannot go into the grand jury room. There is no possibility of perjury before the grand jury prosecution so there is no record and there is not available testimony. This is somewhat consistent with ancient common law practice, as you know.

My concern is this. In having come here from such an environment that protects to such degree the secrecy of the proceedings of the grand jury, I find it most difficult to proceed any further than present practice and am reluctant to extend beyond even the most restrictive present practice.

My question is this. Was there any consideration given to a retreat from the present position to a greater veil of secrecy so that there would be absolutely no access to these records except available to those who participated in the proceeding itself? Not the attorney general, not any other representative of the district attorney's office, except that officer who was present at the proceeding itself?

Judge BECKER. Congressman Gudger, I can't speak for the deliberations in the Criminal Rules Committee. Actually, these deliberations for the most part took place a number of years ago, I think in 1972 or 1973. I think it's a fair statement that nothing was done on these rules for several years while the Congress had the Federal Rules of Evidence under consideration. I think it's a fair statement that they withheld the adoption of additional rules and the proceedings in connection with 6(e) happened a number of years ago.

But I think that it's fair to say that consideration was not given to that view, that consideration was given to the view that because

of the complexity of modern grand jury investigations, because the U.S. attorneys or assistant U.S. attorneys don't have any tax expertise, they need help. They need the right to disclose grand jury material to those who would assist them. In my opinion, I have supported that view and that is why I think there is need for the amendment, but with safeguards which would protect the secrecy of the grand jury and that is what I have founded my views on.

Mr. GUDGER. Thank you.

Mr. MANN. Are there any further questions? Judge Becker, thank you very much.

Judge BECKER. Thank you. I appreciate the privilege of appearing.

STATEMENT OF HON. EDWARD R. BECKER, UNITED STATES DISTRICT JUDGE

I. PRELIMINARY STATEMENT

I appreciate the invitation to appear before the Subcommittee relative to the proposed amendments to Fed. R. Crim. P. 6(e). The statement which I make is my own; I do not appear as a representative of the Judicial Conference of the United States. Subcommittee counsel, in communicating the invitation to me, explained its *raison d'être*: I have written, in the last 5½ years, two extensive judicial opinions about Rule 6(e), hence it was believed that I could be of some assistance to the Subcommittee in its consideration of the amendments. In defense of the decision to invite me it is, I believe, fair to say that the first of those opinions, *In re: Grand Jury Investigation, William H. Pfauwer & Sons, Inc. (Pfauwer)*, 53 F.R.D. 464 (E.D. Pa. 471), which recommended that Rule 6(e) be clarified, in fact initiated and energized the proposed amendment. This occurred through the intervention of Judge Albert Maris of the United States Court of Appeals for the Third Circuit, then Chairman of the Supreme Court Rules Committee, with whom I discussed the opinion in the lobby of the United States Courthouse one day. Although I would not have deemed it appropriate for a United States Judge to *seek* an appearance before this Subcommittee, I am pleased by your invitation, first, because I have thought a great deal about grand jury secrecy problems and, second, because I believe that I can be of assistance to the Subcommittee in view of what I consider to be certain critical omissions in the drafting of the proposed amendment. I add only that since the grand jury, historically, is the arm of the Court, which exercises supervisory power over it, it is not inappropriate that a judge be called upon to comment upon a change in Rules affecting that institution.

II. THE NEED FOR THE PROPOSED AMENDMENT

The heading of Rule 6(e) reads: "Rule 6 The Grand Jury: (e) Secrecy of Proceedings and Disclosure." In its present form, for purposes relevant here, disclosure of matters occurring before the grand jury may be made to "attorneys for the government" for use in the performance of their duties, but not, because of the constricted definition of "attorneys for the government" in Federal Rule 54(c), to other government personnel whose assistance is required by the attorneys for the government in complex investigations.

In *Pfauwer*, for instance, I was confronted with a complex tax investigation, in which scores of cartons of corporate financial records had been produced before the grand jury pursuant to a subpoena. The Assistant United States Attorneys leading the grand jury in its investigation lacked the technical expertise to review and analyze that material and they sought to utilize I.R.S. agents to assist them. The case before me arose on a motion for a protective order against I.R.S. access to grand jury material. In denying the motion I held that, subject to the limitations which I will discuss but which regrettably are not codified by the proposed amendment, access to grand jury material should be afforded to the I.R.S. agents so as to permit them to assist the attorneys for the government in the performance of their duties. The increasing complexity of grand jury investigations, frequently involving analysis of huge quantities of books and records which can meaningfully be reviewed only by accountants or S.E.C. experts or Labor experts, etc., militates in favor of the government's position favoring access to grand jury materials by government personnel assisting attorneys for

the government in the performance of their duties. *Pfau*mer has been widely followed¹ and now represents the prevailing caselaw view. That view is codified in the proposed amendment. I thus support the proposed change which provides:

(e) **SECRECY OF PROCEEDINGS AND DISCLOSURE.** Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. For purposes of this subdivision, "attorneys for the government" includes those enumerated in rule 54(c); *it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.* Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The federal magistrate to whom an indictment is returned may direct that it shall be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

My problem with the amendment, however, is that it is too broadly drafted and does not go far enough in providing safeguards against possible abuse.

III. THE MATTER OF SAFEGUARDS AGAINST ABUSE

A. Introduction

My comments about the matter of safeguards against grand jury abuse cannot be understood unless I first lay some basic foundation about the nature of the grand jury, the scope of its investigative powers, the role of the prosecutor and the court, and the policy of grand jury secrecy. I address these subjects briefly.

The history of the grand jury was succinctly described by Mr. Justice Powell in *United States v. Calandra*, 94 S.Ct. 613, 617 (1974), as follows:

The institution of the grand jury is deeply rooted in Anglo-American history. In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." *Costello v. United States*, 350 U.S. 359, 361-362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 663, 686-687, 92 S.Ct. 2646, 2658-2659, 33 L.Ed. 2d 626 (1972).

Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited . . . by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919). [Footnotes omitted.]

The investigative powers of a federal grand jury are exceedingly broad. See discussion in *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972). The grand jury's

¹ See cases cited in *Robert Hawthorne, Inc. v. Director of Internal Revenue Service*, 406 F. Supp. 1098, 1122 n. 41 (E. D. Pa. 1976).

obligation is to conduct "a thorough and extensive investigation"² and "to run down every clue and examine every witness."³ However, in practical terms it is the prosecutor who provides the initiative needed for an effective grand jury investigation and who controls its course,⁴ hence grand juries have become an investigative and prosecutorial arm of the executive branch of government, and the Courts have recognized this fact.⁵

On the other hand, as we have noted, historically, the grand jury is an arm of the Court. The district court has the power to call a grand jury into existence; 18 U.S.C. § 3331; Fed.R.Crim.P. 6(a). Under Fed.R.Crim.P. 17(a) and 28 U.S.C. § 1826(a) respectively, the district court is given the power to issue and the duty to enforce grand jury subpoenas. It is also settled that the district court has supervisory power over the grand jury and that a broad range of devices is available to a district court in resolving challenges to the propriety of grand jury process. See *In re Grand Jury Proceedings (Schofield I)*, 507 F.2d 963 (3d Cir. 1975). *Schofield* is one of a long line of cases establishing the proposition that federal courts have jurisdiction to quash unreasonable and oppressive federal grand jury subpoenas. See, e.g., *United States v. Calandra*, 414 U.S. 338, 346 n. 4, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 708, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); *Hale v. Henkel*, 201 U.S. 43, 76-77, 26 S.Ct. 370, 50 L.Ed. 652 (1906); *Schwimmer v. United States*, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833, 77 S.Ct. 48, 1 L.Ed.2d 52 (1956); *In re Grand Jury Subpoenas Duces Tecum Addressed to Certain Executive Officers of M. G. Allen & Assoc., Inc.*, 391 F.Supp. 991 (D.R.I. 1975). See also Fed.R.Crim.P. 17(c); cf. 28 U.S.C. § 1826(a) (enforcement). While the relief to be granted may take various forms, it is plain that the District Court's supervisory power over the grand jury is not limited to granting relief from unreasonable and oppressive grand jury process. Rather, it extends to granting relief from any type of grand jury abuse. See cases cited at 406 F. Supp. 1194 n. 29 for examples. So there is a tension between the role of the prosecutor and the role of the Court in the grand jury process—but what emerges from the dialectic is that, notwithstanding the prosecutor's leadership role, the grand jury remains the arm of the Court, not the tool of the prosecutor. Let me turn now to the policy of secrecy.

The policy of secrecy surrounding grand jury proceedings reaches far back into the history of that institution. The reasons for that policy are generally regarded to have been set forth in *United States v. Amazon Industrial Chemical Corp.*, 55 F.2d 254, 261 (D.Md. 1931); (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberation, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicated by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. All of those policies are important especially while the grand jury investigation is underway. In terms of safeguards against possible grand jury abuse, the policy which concerns me most today is (5): to protect innocent parties from the harmful effects of disclosure. I will come to that aspect of the matter shortly.

B. The "Aegis" Requirement

In the *Pfauver* case my Order permitting I.R.S. access to the material subpoenaed before the grand jury provided that the subpoenaed material was to remain at all times "under the aegis of the Attorneys for the Government." I believe that the aegis requirement should be added to the amended Rule.

In practice when a citizen turns over his cartons of papers to the grand jury they will be examined by the government personnel assisting the attorneys for the government in the offices of their own agency. We must remember in that context, that access to these records was made possible because they were subpoenaed to a *secret* grand jury. We must also note that grand jury material will often be examined pursuant to Rule 6(e) by government administrative

² *Wood v. Georgia*, 370 U.S. 375, 392 (1962).

³ *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970).

⁴ See discussion in *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1119-20 (E.D. Pa. 1976).

⁵ See *In re: Grand Jury Proceedings*, 456 F.2d 85, 89-90 (3d Cir. 1973).

agencies, and yet: (1) the powers of federal administrative agencies are tightly circumscribed by the statutes creating them; (2) federal agencies (including I.R.S.) are not permitted to launch general investigations which do not concentrate on a specific target; (3) agency subpoenas are subjected to greater scrutiny than grand jury subpoenas; (4) the agencies are not usually subject to the direct supervision of the courts; and (5) their activities, unlike those of the United States Attorney in connection with a given prosecution, are ongoing, so that vindication at trial does not serve as a meaningful protection in cases of abuse.

Congress has thus determined not to give administrative agencies powers comparable to the grand jury. Yet the danger exists that the execution may accede to the grand jury's extraordinary powers via Rule 6(e). This aspect of the matter is discussed at length in my opinion in *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F.Supp. at 1123-25. Attention must also be given in this regard to the fact that one real challenge of Rule 6(e) is the prevention of the use of grand jury process primarily for civil or administrative ends.⁶

The conclusion which I draw from the foregoing is that to permit personnel assisting attorneys for the government to have unfettered access to grand jury material could lead to a number of kinds of abuse:—not just the improper access to which I have referred but also possible public disclosure of the subject matter of a grand jury investigation. It must be remembered that the grand jury's proper role is as the arm of the court. If this new Rule goes into effect without change, prosecutors might justifiably conclude the grand jury is the arm of the prosecutor and that they have been given free and untrammelled rein in sharing information obtained under compulsion of a grand jury subpoena with any government agency which, in their sole discretion, they believe could "assist" them in the performance of their duties. The "aegis" requirement⁷ would inhibit that.

In sum, the "aegis" requirement vests in a responsible officer of the court, the United States Attorney, the responsibility for safeguarding the secrecy of grand jury material. I strongly commend the aegis requirement to you in the form of a proposed proviso to the amended Rule:

Provided, however, that where access to grand jury material is afforded to government personnel assisting the attorneys for the government in the performance of their duties, such material shall remain under the aegis of the attorneys for the government.

Is the aegis requirement meaningful? I believe that it is. There are in essence three ways of implementing it: (1) the adoption of internal procedures by the United States Attorney designed to protect secrecy; (2) adoption of a court rule requiring the United States Attorney to do so; and (3) a requirement by federal or local rule that the United States Attorney apply for § 6(e) orders in every case or at least in certain kinds of cases. Let me take these up in order.

In the Eastern District of Pennsylvania, the United States Attorney has voluntarily developed comprehensive internal grand jury procedures. These procedures were submitted to me in camera in connection with the *Hawthorne* case, 406 F.Supp. at 1127 n.56. The procedures set up an excellent "housekeeping" system for monitoring grand jury subpoenas and records which itself helps to check potential abuse, and which fosters the preservation of secrecy through accountability, because the system permits identification and tracking of records subpoenaed to a given grand jury. Moreover, the procedures include provisions which notify all government agencies whose personnel may be called upon to assist the United States Attorneys that grand jury records are secret and access thereto is restricted, that disclosure to outsiders is forbidden without prior authorization and that the materials remain under the aegis (custody and control) of the government. I believe that self-imposed rules are more desirable because of the possibility that every minor breach of a court imposed rule will form the basis of a pretrial motion interposed by a defendant indicted pursuant to the grand jury investigation, an undesirable result.⁸

⁶ In my oral presentation before the committee I discussed the extent to which grand jury material could ultimately be used for civil purposes so long as the criminal investigation was in good faith.

⁷ Aegis is defined by Webster as: protection, defense, controlling or conditioning influence, guidance or direction.

⁸ "Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigations and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States v. Dionisio* (1973) 410 U.S. 1, 17.

How can the aegis requirement be enforced in the absence of procedures such as one in effect in the Eastern District of Pennsylvania? The court—or the amended Rules—could require that application to the court for a § 6(e) order be made when ever outside assistance is sought. Indeed, the Rule (or the court) might well require a showing that outside assistance is necessary. I have always required an in camera showing to this effect in considering Rule 6(e) Orders. The desirability of requiring the Justice Department to establish need for outside assistance might be one reason for a Rule requiring a Rule 6(e) Order in every case where outside assistance is sought. (Of course, the need for outside assistance could be sharply reduced if the Congress were to increase the budget of the Justice Department so as to provide it with the necessary technical expertise.

On the other hand, the requirement that there be a 6(e) Order in every case could burden the courts. I suggested a viable alternative in Hawthorne, i.e. that 6(e) orders should be applied for whenever the technical assistance of the I.R.S. or a similarly situated agency *outside* the Justice Department (e.g., the S.E.C.) is to be utilized in connection with a grand jury investigation, with the exception of cases where the assistance is of minor proportions or the single instance variety (e.g., utilization of Postal Service or Secret Service expertise in obtaining and evaluating handwriting exemplars or other identification material).

Let me explain my terms further. I have used the term "technical assistance," but I do not impart to "technical assistance" a meaning which would subsume routine investigation by an F.B.I. agent, for example, in support of the grand jury investigation. The classical case for the application for 6(e) orders is where the technical assistance sought is that of the I.R.S. or S.E.C., or of some other agency which has a continuing regulatory or oversight responsibility with respect to the activities of an individual or corporation. In such instances, there is a greater hazard of the use and retention of grand jury material beyond the aegis of the U.S. Attorney so as to breach the secrecy of the grand jury and pervert the grand jury process.

My reference to "agencies outside the Justice Department" is a function of the fact: (1) that the U.S. Attorney is an officer of and subject to the control of the Court; and (2) that the U.S. Attorney has more control over agencies within the Justice Department (of which the U.S. Attorney General is the common head) than agencies outside. There may also be cases where 6(e) orders should be applied for when the technical assistance is of some magnitude and is provided by agencies within the Justice Department. See, e.g., *United States v. Universal Mfg. Co.*, 525 F. 2d 808 (8th Cir 1975); cf. *In re Stolar*, 397 F. Supp. 520, 522-23 (S.D. N.Y. 1975).

In theory it may well be that a 6(e) order should be required for prophylactic purposes whenever any person or agency other than an "attorney for the government" has access to grand jury materials. However, to repeat, the administrative burden on the U.S. Attorney, judges, and clerks of court would be enormous; hence, 6(e) applications should, it would seem, be reserved to cases where the technical assistance is of such substance and duration that, notwithstanding the good faith and aegis of the U.S. Attorney, the danger of breach of secrecy remains. Moreover, I reiterate my view that, where the U.S. Attorney has developed satisfactory internal procedures, a 6(e) order is unnecessary.

There is another extremely important advantage of including the "aegis" requirement in the Rule, i.e. that it lends itself to judicial construction in accordance with traditional role of the courts. The courts thus could "flesh out" the requirement, and mold it to the circumstances of a given case. The discussion which I have just engaged in supports that position. In Hawthorne, for instance, (involving technical access by I.R.S.) I perceived three overlapping areas of need for Justice Department supervision and imposed requirements to meet these needs. First, there was the need for the U.S. Attorney to make clear to personnel from outside agencies just what the scope of their role was. Second, I perceived a need for continuing supervision by the U.S. Attorney and continuing segregation of grand jury matter from unrelated cases. Third, I recognized a need for accurate record keeping and an index, of sorts, in order to facilitate effective judicial supervision in the event of a claim of grand jury abuse. The requirements might vary from case to case, and, under the "aegis" of the "aegis" requirement, be judicially evaluated from time to time.

Including an "aegis" requirement in the contemplated rule would seem to provide a reasonable accommodation of the interests in secrecy and the goal of full scale investigation, by giving the supervising court the leeway to balance the competing interests in determining what is required to protect grand jury secrecy in a given investigation, and to provide an adequate record to adjudicate any subsequent claim of grand jury abuse.

There are two other thoughts which I will add on the subject of drafting the revised Rule. Perhaps it would be well to denote that the assistance rendered by the government personnel is to the *grand jury* rather than to the attorneys for the government, for that is the true state of affairs and perhaps there should be added to the express limitation that the access of the other government personnel is restricted to performing their duties in providing necessary assistance to the grand jury at its request. In sum, amendments to the Rule of Secrecy would do well to emphasize the independence of the grand jury, its role as the arm of the court and the responsibility of the U.S. Attorney, the grand jury's "fearless leader," as it were, to preserve its secrecy.

IV. PROTECTION OF GRAND JURY SECRECY AS AFFECTED BY LEGAL PROCEEDINGS ANCILLARY TO GRAND JURY INVESTIGATIONS

Proceedings before the grand jury inevitably to give rise to a variety of legal proceedings ancillary thereto, including motions to quash, limit, modify or enforce grand jury subpoenas or for protective orders with respect thereto, motions to furnish identifying characteristics to the grand jury or its agent, or to compel testimony before the grand jury, and motions for an order of immunity. The Supreme Court Rule under consideration by the Subcommittee does not deal with the protection of grand jury secrecy as affected by such ancillary legal proceedings. However, the title of Rule 6(e) is "Grand Jury—Secrecy and Disclosure," and the policy of grand jury secrecy is a mighty important one which is doubtless of official as well as personal importance to the Subcommittee. And while it may be beyond the charter of this Subcommittee's present inquiry, I take the liberty of calling to its attention a local rule recently adopted by my court dealing with that matter.⁹

The former practice in our district was for such motions to be filed in a miscellaneous docket as part of the public record. The result of this practice was that the media would frequently report (based upon allegations of the motion) that the grand jury was investigating a given individual and had subpoenaed his records about a given subject. And yet, in many cases, the subject of the media report was never indicted. This result so grossly offended the policy and purpose of grand jury secrecy that we passed a local rule which provided that neither the government nor any moving party shall disclose in any affidavit, motion or other paper filed in the public record, nor in the caption thereof, the identity of any grand jury witness, or person under investigation or specific grand jury investigative subject area, other than that of himself, herself or itself, unless *in camera*, under seal, or where the paper is already subject to an order of imposition, except where the grand jury witness or person under investigation has disclosed his, her or its own identity in relation to the same proceedings in any publicly filed paper, or where such disclosure has been expressly authorized by an order of the court.

The Rule contains a proviso that nothing therein shall prohibit attorneys for the government from the use of such matters as are necessary for the performance of their official duties in accordance with Federal Criminal Rule 6(e). And, in order to facilitate its implementation, the Rule provides that any motion, affidavit or other paper relating to matters or proceedings before the grand jury may be filed anonymously or pseudonymously, with the name or information thus protected provided to the court *in camera* and under seal. In the event of the Committee's interest, a copy of the Rule is attached to my statement.

The Rule has worked effectively since its adoption and has, in my judgment, been accepted by the media as a proper implementation of the respected and historic principles of grand jury secrecy. In this regard it is instructive to rescribe excerpts from an article in a Philadelphia daily newspaper shortly after the Local Rule 4(c) was adopted:¹⁰

⁹ Local Rule 4(c) E.D.Pa. amended June 30, 1976.

¹⁰ Philadelphia Daily News, Friday, July 16, 1976, byline of Jill Porter, entitled "Why Court Ordered Secrecy Reforms."

It's too late for x and y [prominent public officials, names omitted here].

But the new federal court clampdown on grand jury secrecy may protect future public officials from finding their names in headlines listing them as grand jury targets.

A loophole in secrecy provisions enabled reporters to fully document the tug of war between federal grand juries and x and y.

While it was assumed that the term "grand jury" carried a connotation of secrecy, the secrecy had been limited and fragile—a drape of cheesecloth rather than a shutter of steel.

Until U.S. District Court judges changed their procedural rules this week, all a public official had to do to unintentionally reveal he was the subject of a federal investigation was file a related legal motion—such as a motion to quash a subpoena. A prosecutor's motion would have the same effect.

Those motions were considered public documents and were reported by the press. Under the new rules, those motions will get the same protection given actual grand jury testimony by being filed secretly.

Despite the traditional secret nature of a grand jury investigation, all motions arising from the federal grand jury were considered public record. They were fair grist for a reporter's notebook and open to public scrutiny.

That x is under investigation for allegedly taking kickbacks from architects is documented in affidavits filed in response to a motion by x to quash a subpoena for his records.

That y is under investigation for alleged embezzlement of union funds is documented in papers filed by the U.S. attorney seeking to disqualify an attorney associated with the case.

In tightening their secrecy, the federal judges may have taken a lead from state grand jury procedures in Philadelphia.

Common Pleas judges supervising the special prosecutor's grand jury have ruled that all motions stemming from that panel be impounded. But the matter automatically becomes public if a decision is appealed, since appeals are considered public documents.

As far as I can ascertain, the docketing practice relative to legal proceedings ancillary to grand jury investigations varies from district to district throughout the country; in some districts all such proceedings are filed under seal, whereas others follow the former practice in the Eastern District of Pennsylvania. I leave to the Subcommittee whether this is a matter of concern or for action by anyone and if so whether by the Subcommittee or by the Supreme Court Rules Committee. It may also be that these subjects are to be dealt with in accordance with local practice and local Rule. In any event, in view of the general subject before the Subcommittee today and the Subcommittee's general concern with the administration of criminal justice, I commend the Eastern District of Pennsylvania's Local Rule for whatever consideration you deem appropriate.

APPENDIX

LOCAL RULE OF CRIMINAL PROCEDURE 4(c)

(c) In legal proceedings relating to grand jury investigations, including but not limited to motions to quash, limit, modify or enforce a grand jury subpoena or for a protective order with respect thereto, motions to furnish identifying characteristics to the grand jury or its agent, or to compel testimony before the grand jury, and motions for an order of immunity:

1. The United States (whether acting as a party or as counsel for the grand jury) shall not disclose the identity of any grand jury witness, person under investigation or specific grand jury investigative subject area in any affidavit, motion or other paper filed in the public record, nor in the caption thereof, except *in camera*, under seal, or where the paper is already subject to an order of impoundment; provided, however, that the United States may disclose in such affidavit, motion or other paper the identity of a grand jury witness or person under investigation who has previously disclosed his, her or its own identity in relation to the same proceedings in any publicly filed paper, or where such disclosure has been expressly authorized by an order of this Court; and provided further that this rule shall not prohibit attorneys for the government from the use of such matters as are necessary for the performance of their official duties in accordance with Federal Criminal Rule 6(e).

2. No person shall disclose in any affidavit, motion or other paper filed in the public record, nor in the caption thereof, the identity of any grand jury witness, or person under investigation or specific grand jury investigative subject area, other than that of himself, herself or itself, unless *in camera*, under seal, or where the paper is already subject to an order of impoundment, except where the grand jury witness or person under investigation has disclosed his, her or its own identity in relation to the same proceedings in any publicly filed paper, or where such disclosure has been expressly authorized by an order of this Court.

3. In order to facilitate implementation of this rule, any motion, affidavit or other paper relating to matters or proceedings before the grand jury may be filed anonymously or pseudonymously, with the name or information thus protected provided to the Court *in camera* and under seal.

NOTE.—Rule 4 amended June 30, 1976, effective immediately.

Mr. MANN. Our next witness is Acting Deputy Attorney General Richard L. Thornburgh. He has served the Justice Department both as Assistant Attorney General in charge of the Criminal Division and as the U.S. attorney for the Western District of Pennsylvania.

Mr. Thornburgh is no stranger to the subcommittee and it's a pleasure to welcome him back again.

We have the written statement which you have submitted. Without objection, it will be made a part of the record and you can proceed as your time constraints and your wishes may lead you.

TESTIMONY OF RICHARD L. THORNBURGH, ACTING DEPUTY ATTORNEY GENERAL; ACCOMPANIED BY ROGER A. PAULEY AND JACK PERKINS

Mr. THORNBURGH. Thank you, Mr. Chairman.

I might suggest to the Chair that, as a means of expediting your proceedings the statement as filed might be included in your record and perhaps, based on what evidence has been presented this morning, I and my colleagues, Mr. Roger Pauley and Mr. Jack Perkins, could present ourselves for such questions as the subcommittee may have.

On the other hand, if it's your preference that we speak our piece on the statement that has been filed, we will be more than pleased to do that.

Mr. MANN. The statement as presented will be made a part of the record.

I think it would be a good idea for you to present the highlights of your position.

Mr. THORNBURGH. I'll be more than happy to.

It is the Department's view that the Judicial Conference has done an excellent job in developing these proposed amendments to the criminal rules and we support as drafted all of the proposed amendments.

The Advisory Committee Notes generally make clear the significance of, and the justifications for, the proposed changes, and I shall therefore not undertake to discuss all of the proposals.

There are three proposals, however, that warrant discussion at some length from the Department's perspective, namely those involving rules 6(e), 24(b), and 41(c)(2).

Rule 6(e). Secrecy of Grand Jury Proceedings.

Except for the jury's deliberations and the votes of individual jurors, which are always kept secret, rule 6(e) now contains two gen-

eral provisions for the disclosure of matters occurring before a grand jury. The first provision allows for disclosure, without a court order, to the attorneys for the Government for use in the performance of their duties. The other provision allows for disclosure by order of the district court preliminary to or in connection with a judicial proceeding or when necessary in connection with motions to dismiss indictments.

The pending amendment to rule 6(e) proposes to alter the first provision only, so as to include in the current definition of the term attorneys for the Government "such other personnel as are necessary to assist the attorneys for the Government in the performance of their duties."

In our view, this proposal is of a clarifying rather than a substantive nature. It has long been the Department of Justice's interpretation of the existing provision, supported by decisions of Federal appellate courts, that an attorney for the Government, upon his own authority and without an order from the court, may make certain disclosures to investigatory personnel for the purpose of discharging his duties as a Government attorney.

The notes of the Advisory Committee confirm that the intent underlying the proposed change is simply to codify present practice. The notes point out that "there is often Government personnel assisting the Justice Department in grand jury proceedings," and go on to observe that although the "case law is limited, the trend seems to be in the direction of allowing disclosure to Government personnel who assist attorneys for the Government in situations where their expertise is required." This proposed amendment is thus designed merely to adopt the present trend of case law governing this aspect of rule 6(e) disclosure.

We understand that some persons are concerned that the proposed amendment will further the possibility of unwarranted breaches of grand jury secrecy and improper use of grand jury evidence.

I want to assure this subcommittee that the Department has a jealous regard for grand jury secrecy and would not wish the present restrictions to be eroded. In our view, however, the proposed amendment will not have any such effect. Rather, by recognizing the realities of present practice, necessity, and case law, it serves to clarify what has been a persistent and perplexing source of confusion.

Let me stress that the amendment will not permit the Department of Justice to take advantage of or make disclosures to investigative agents or experts in order to aid other Federal agencies in conducting their own investigations. Grand juries may not lawfully collect or disseminate evidence intended for use in other proceedings, and a person who is a party in such a proceeding, brought against him by another Government agency and related to the subject matter of a prior grand jury investigation, may properly move to suppress any evidence, and the fruits thereof, found by the court to have been used against him in violation of the principle.

Moreover, both under this amendment and now, any improper disclosure by an attorney for the Government would constitute a serious breach of grand jury secrecy that is punishable as a contempt of court.

The question may be posed as to why the Department of Justice needs routine authority to make disclosures to investigative agents and the like. These disclosures serve the primary purpose of preparing the attorney for the Government in going before the grand jury and presenting the investigation in an orderly fashion.

Frequently, the prosecutor is in possession of evidence, for example, fingerprint or voice comparisons, or books and records of complex financial or tax transactions, that neither he, nor the laymen constituting the grand jury, can adequately comprehend without the assistance of expert help in the form of Internal Revenue Service or FBI agents trained at unraveling such complexities.

Disclosure to these agents then becomes a matter of necessity in order to make sure that significant evidence is not overlooked or that, through a misapprehension of the evidence, an unwarranted indictment is not returned.

As a court of appeals recently declared in upholding a district court's refusal to issue a protective order to prevent IRS agents from seeing subpoenaed materials, "[the] agent's special knowledge and skill in examining corporate records were deemed a legitimate as well as an advisable resource in the U.S. attorney's conduct of an investigation of possible crime." Having made such disclosures to Government agents or experts assisting him, the Government attorney may then bring the agents or experts before the grand jury to explain the pertinent aspects of their findings, or the assistance of the agents may prove valuable in framing questions to other persons testifying before the grand jury.

In addition, disclosure of grand jury evidence to investigative agents is often necessary to permit the agents to conduct interviews and otherwise pursue leads suggested by such evidence.

An investigation, of course, does not cease with the start of the presentation of evidence to a grand jury, nor even, necessarily, with the return of an indictment. It is thus frequently appropriate, in the performance of their duties, for attorneys for the Government to make disclosures to law enforcement agents to assist the attorney in the continuation of a criminal investigation.

In short, disclosures by Federal prosecutors to other persons whose assistance is needed in presenting or evaluating evidence for use in a grand jury proceeding or in pursuing the criminal investigation to its conclusion is essential in a large number of cases in order to permit the Government attorney and the grand jury to perform their duties in a responsible and just manner. To require a court order in each instance in which such a disclosure is sought to be made would unnecessarily burden the courts with thousands of applications each year. This burden is not justified by the record, which historically shows very few occasions in which this power has been misused. Moreover, for those rare instances the penalty of contempt, criminal charge and the remedy of suppression of evidence afford adequate means of redress. We thus support the proposed amendment to rule 6(e) to clarify the extent of the prosecutor's disclosure authority in this area.

As to peremptory challenges set forth in rule 24(b), we would note that this rule presently provides in a capital case each side is presently entitled to 20 peremptory challenges, that in a noncapital felony

prosecution the defendant or defendants jointly are entitled to 10 peremptory challenges, while the Government is entitled to six; and that in a misdemeanor prosecution each side has three peremptory challenges. In addition, the rule permits the court to grant additional peremptory challenges to the defendants, but not to the government, in any case.

The pending amendment would both reduce and equalize, as between the government and the defense, the number of peremptory challenges. In a capital case, each side would have the right to exercise 12 peremptory challenges; in a felony prosecution, the number of peremptories available to each side as a matter of right would be five; and in a misdemeanor case, each side would be entitled to two peremptory challenges. For good cause shown, the court could grant additional peremptory challenges, not necessarily on an equal basis, to either the Government or the defendant, or both.

A peremptory challenge, of course, unlike a challenge for cause, permits a party in a criminal case to excuse a prospective juror during pretrial voir dire examination (usually conducted by the court) for any reason, and indeed normally without a reason being stated.

Although nothing in the Constitution requires the Congress or the State to permit any peremptory challenges, nonetheless, the challenge, by virtue of its roots in English common law and its persistent use in this country dating from colonial to modern times in both the Federal and State criminal justice systems, has become established as a vital and necessary part of trial by jury.

At the same time, while the right to peremptory challenges is undeniably still an integral feature of the Federal criminal justice process which few have proposed to abolish, the trend in our law, evidenced by periodic acts of Congress on the subject since 1790, has been in the direction of a reduction and equalization of the number of such challenges. The States have followed a parallel course. Thus, the proposed amendment to rule 24(b) is consistent with the historical trend regarding the exercise of peremptory challenges.

The Department of Justice perceives the issues surrounding the pending amendment to rule 24(b) as twofold: first, should the number of peremptory challenges available as a matter of right to the parties be the same; and second, should the number of such challenges be reduced from their present levels. We answer both questions in the affirmative.

Equalization of the number of peremptory challenges available as a matter of right to both sides in a criminal case is in accordance with the basic purpose of the peremptory challenge. Further, as the Advisory Committee's note observes: "Proper use of peremptories by the Government can contribute to a fair trial as effectively as proper use by the defendant."

Since the Government, which represents the public in criminal cases, is entitled no less than the defendant to a fair trial, it seems appropriate to permit both the Government and the defendant to exercise, at least initially as a matter of right, an equal number of peremptory challenges. Indeed, the inequality that exists under current rule 24(b) with respect to the number of peremptories available in noncapital felon cases—10 for the defendant; six for the govern-

ment—is not justifiable in terms of any apparent policy embodied in the rule itself.

Under the present rule, each side is entitled to an equal number of peremptory challenges in capital cases, 20, and in misdemeanor prosecutions, three.

There is no evident reason for the disparity with regard to non-capital felonies. Moreover, as the advisory committee note has indicated, Congress “adopted the principle of equality in its more recent legislation dealing with the question, the District of Columbia Court Reorganization Act of 1970.”

In our view, it is also appropriate to reduce the number of peremptory challenges afforded to the parties in criminal cases.

For one thing, as the advisory committee note points out, echoing the sentiments of other commentators, such a reduction will accelerate the voir dire process and permit the use of smaller jury panels, thereby leading to substantial savings in public moneys.

In addition, the present levels of peremptory challenges, in felony cases particularly, do not adequately guard against the phenomenon, whose incidence seemingly is on the rise today, of systematic elimination of members of a given class, race, or group from the jury panel.

As I am sure members of this subcommittee are aware, it has become a frequent practice for criminal defendants charged with political corruption or white collar offenses who are financially able to do so to commission sociological studies and opinion polls to determine the attitudes of particular segments of the community in which their trial is being held as a basis for utilizing peremptory challenges.

Opinions may be sampled and collated according to such factors as race, color, religion, sex, national origin, economic status, and the like.

In some instances, such studies coupled with the judicious exercise of peremptory challenges, have apparently been successful in permitting defendants to shape the ultimate trial jury and thereby augment the chances of a favorable verdict.

As the advisory committee note indicates, this kind of utilization of the peremptory challenge right is inconsistent with the policy expressly stated by Congress in the Jury Selection and Service Act of 1968 that “all litigants” shall have the right to juries selected at random from a fair cross-section of the community, without any citizen’s being excluded from service on the ground of race, color, religion, sex, national origin, or economic status. See 28 U.S.C. 1861, 1862.

Moreover, the increasing tendency of moneyed defendants to take advantage of such sociological and opinion polls will undoubtedly fuel claims by indigent defendants to have such polls conducted in their cases at public expense.

Pressures, heretofore resisted by U.S. Attorneys and the litigating Divisions of the Justice Department, will also mount on Federal prosecutors to use public funds to conduct like surveys to guide their own exercise of peremptory challenges in important cases.

In our view it is important to resist the growth of this unhealthy phenomenon, which threatens to demean, and undermine the perceived fairness of, our criminal justice system.

Using peremptory challenges systematically to try to mold the composition of a jury by eliminating members of certain classes or ethnic

groups—even if such elimination proceeds from erroneous premises as to the attitudes of these groups and does not lead in all cases to a favorable result—portrays the criminal justice system in a bad light, not as a system where the verdict is primarily dependent, as it should be, upon the quality of the evidence presented and the judge's instructions on the law, but upon whether the “proper” racial or cultural makeup of the jury can be obtained.

This phenomenon can continue, however, only so long as the number of peremptory challenges remains, as it is today, at sufficiently high levels to permit effective manipulation of the jury panel. Thus, a reduction in the number of peremptory challenges available to both sides, particularly as it applies to felony prosecutions, is a proposal we look upon with favor, in part because it is a means of preventing resort to improper methods of juror “selection” by the parties.

With respect to rule 41(c) (2) applying to a search warrant upon sworn oral testimony, we would note first that the present rule 41(c) permits a search warrant to be issued only upon the request of an attorney for the Government, or a Federal law enforcement officer authorized to apply for a search warrant.

Under rule 41(c), issuance of a search warrant requires a showing of probable cause by means of an affidavit sworn to before the magistrate or judge.

Under rule 41(a), an officer seizing property pursuant to a warrant must give the person from whom or from whose premises the property is taken, a copy of the warrant.

Because the Federal law enforcement officer requests issuance of the warrant, executes the supporting affidavit, or needs to have a copy of the warrant in his possession, the officer must generally go to the place where the magistrate or judge is sitting if he is to conduct a search under the authority of a warrant.

The proposed amendment would create a new method of obtaining a search warrant. In limited circumstances, it would authorize issuance of a warrant over the telephone or by other appropriate means of communication.

The amendment would not repeal any existing provision of rule 41, nor would it change the grounds for issuance of a warrant. Furthermore, the amendment would not do away with the search warrant as a document to be carried by an officer making the search.

Issuance of search warrants through the medium of the telephone or otherwise under this amendment would be authorized only “when the circumstances make it reasonable to do so.” Otherwise, present procedures would be followed.

Proposed rule 41(c) (2) could be used only by a “Federal magistrate,” a term that of course includes a Federal judge. The procedure would not be available, however, to the issuance of a Federal search warrant by a State judge.

If the Federal magistrate found that the circumstances justified employment of this new procedure, he would hear testimony communicated to him by telephone, radio, or other suitable means. The magistrate must record the sworn oral testimony and have it transcribed. He must then certify the transcription and file it with the court. Sworn oral testimony thus recorded and transcribed would be deemed an affidavit for purposes of rule 41.

Under the proposed amendment, if the Federal magistrate is satisfied that grounds for issuance of a warrant exist, a written search warrant would be drawn up, subject to all the present requirements as to the contents of search warrants. The Federal officer or Government attorney requesting issuance would be required to read the contents of the proposed warrant, verbatim, to the magistrate.

The magistrate could direct the making of specific modifications in the warrant. Once the form has been approved, the magistrate would direct the Federal agent or Government attorney to sign the magistrate's name on the warrant, which would then be regarded as a duplicate original warrant.

The magistrate would make out his own warrant, which would be regarded as the original warrant, upon the face of which he would be required to enter the exact time of his issuance of the duplicate original.

This type of warrant would be returned in conformity with existing law, rule 41(d), with one additional requirement. Upon return, the person who gave the sworn oral testimony would have to sign a copy of the transcribed testimony.

The extensive advisory committee note, I believe, demonstrates that the procedure under the amendment is an essential equivalent of the present procedure. To be sure, there would not be face-to-face contact with the affiant, and the magistrate would have to work a little harder than if he had in hand a written affidavit to read; but we share the advisory committee's confidence that the amendment can be implemented without serious difficulty.

In the Department of Justice's judgment, moreover, the proposed amendment is clearly desirable. The Supreme Court has often indicated that even when circumstances permit law enforcement officers to conduct searches without warrants, search warrants should be obtained whenever it is reasonably practical to do so.

It is not difficult to appreciate why the warrant procedure is preferred. A magistrate can judge the facts from a more objective viewpoint than can a law enforcement agent or a prosecutor. Thus, interjecting a judicial officer into the determination of probable cause tends to further the protections accorded to individuals under the fourth amendment to our Constitution. In addition, persons who are on the scene when a search and seizure occurs may accept the situation more readily when a written, authoritative document is used than when the officer acts on his own.

Furthermore, if the magistrate holds that there is not sufficient cause for issuance of a warrant, this may help the officer. He may be able to obtain the additional information needed to justify a search, and may then succeed in making a case that would have been ruined if he had acted precipitously.

The proposed amendment will undoubtedly have the effect of rendering it more practical for search warrants to be secured, and will thus reduce the incidence of warrantless searches. It will also be of considerable aid to Federal law enforcement agents in resolving difficult practical and legal problems in search and seizure situations.

As the advisory committee note points out:

Federal law enforcement officers are not infrequently confronted with situations in which the circumstances are not sufficiently exigent to justify the seri-

ous step of conducting a warrantless search of private premises, but yet there exists a significant possibility that critical evidence would be lost in the time it would take to obtain a search warrant by traditional means.

In such instances, the proposed amendment will create a procedure whereby both the interests of the individual under the fourth amendment and of society in investigating probable criminal activity can be harmonized.

Even where exigent circumstances might in retrospect be found to have existed, the procedure under the amendment will be of benefit, since law enforcement officers will have the means, and will thus be encouraged, to opt for the safer legal course of trying to obtain a search warrant before taking unilateral action. If a team of agents is surveilling a movable vehicle thought to contain stolen goods, for example, one can be dispatched to telephone or radio a magistrate for a warrant under the new procedure, while the others remain at their posts ready to make a warrantless search if circumstances dictate the necessity or advisability of doing so prior to the time a warrant can be obtained.

While it is possible to employ this tactic today, the time ordinarily required to obtain a warrant renders it seldom feasible. Under the proposed amendment, I would expect that such a procedure would become more commonplace.

The telephone search warrant process, which is presently the law in Arizona and California, has rightly been considered to be constitutional by both courts and commentators.

It is the conclusion of the Department of Justice that the proposal fashioned by the Judicial Conference deserves support as an amendment that will both facilitate effective law enforcement, while fortifying the fourth amendment safeguards of the individual.

Thank you, Mr. Chairman, for your patience in hearing our prepared remarks.

We would be pleased to try to answer any questions of the subcommittee at this time.

Mr. MANN. Thank you, Mr. Thornburgh.

I failed to give proper recognition to your assistants, Mr. Roger A. Pauley, who served this committee with distinction for a considerable length of time, and Mr. John Perkins.

We are glad to see you both.

The committee will now inquire.

Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Thank you, Mr. Thornburgh, for your testimony. I understand the new Attorney General to have said that under his new administration the Department of Justice is going to be a "department of justice".

I must say that in that respect I am quite disappointed that the Department of Justice is supporting a rule which will permit search warrants to be obtained without the applicant appearing in court. I think it marks a major departure from our practice.

I think we all recognize that searches by the Government are an extraordinary invasion of the liberties of people and the Constitution properly proscribes governmental intrusion by an amendment.

If I may say so, I think it is more likely that this telephonic procedure will be used as a substitute for the search warrant practice

presently in use than, as you claim, a substitute for warrantless searches.

I find it disappointing, indeed, that this is the position the Justice Department takes. I think there is no substitute for an affiant coming directly before a magistrate or a judge and taking an oath directly or writing a document upon which he can be examined. I think it is very easy for someone who is only talking on the phone or on the radio to perhaps be less careful about the truth. There is no requirement in the proposed rule that the person make the statement under oath.

Mr. THORNBURGH. There is a requirement that he make the statement under oath to the magistrate.

Ms. HOLTZMAN. Who is administering the oath that he is taking?

Mr. PAULEY. It is being recorded.

Ms. HOLTZMAN. That creates a certain problem. The magistrate himself is administering the oath.

Mr. THORNBURGH. That is what he does presently, Ms. Holtzman.

Ms. HOLTZMAN. It is generally not the magistrate who is the notary public for the affidavit; would you agree?

Mr. THORNBURGH. I am sorry, no, I don't agree. The magistrate administers the oath to the agent who appears before him seeking a search warrant and under the proposed procedure he would administer an oath that would be recorded to the individual who was making the same application over the phone, so that in that respect—

Ms. HOLTZMAN. I am glad you corrected me with respect to the magistrate's administering the oath. On the other hand, the magistrate has no idea as to whether or not the agent is raising his right hand or the extent to which he, at long distance, can be impressed by the court's authority.

Mr. THORNBURGH. The penalties of perjury would apply in either case.

Ms. HOLTZMAN. How many perjury prosecutions have been brought, sir, for improper affidavits?

Mr. THORNBURGH. I would hope few, because I know of no improper—

Ms. HOLTZMAN. I have no further questions.

Mr. MANN. Does the perjury law reach telephonic oath-taking?

Mr. THORNBURGH. Any statement made under oath and recorded and signed would be subject to the perjury statute and the false statement statutes as well, probably.

Mr. MANN. I wonder if the term "recorded" is used in the perjury law?

Mr. THORNBURGH. The proposed procedure is amplified by the requirement of signing after the fact and I think that if there were any doubt about the false swearing having taken place over the phone, it would be cured and amplified by that signature.

Mr. MANN. Mr. Hyde.

Mr. HYDE. I thank you, Mr. Chairman.

Mr. Thornburgh, I congratulate you on your usual lucid contribution. I am just not persuaded that since the government represents the public in criminal cases it is entitled to, no less than the defendant, a fair trial.

I am persuaded thus far. It seems appropriate to permit both the government and the defendant to exercise at least initially as a matter of right an equal number of peremptory challenges. But I really don't think in your average criminal case that you do stand on the basis of equality before the bench. You have got the FBI and you have got vast resources that are available, plus you have the aura of the courtroom and the judge and the government and the people and you have got Jose Garcia there, who isn't the people and the government and doesn't have these resources.

Mr. THORNBURGH. We also have the burden of proof.

Mr. HYDE. You do have the burden of proof, but where there is smoke, there is fire. You can't repeal these old adages that color people's minds, such as, "The government wouldn't be here if they didn't have something."

Especially in a capital case, although we are being very theoretical now because we are not trying a capital case. But I am not distressed by giving a defendant a few more peremptory challenges on a felony than the government.

Mr. THORNBURGH. That is an area where they are now equal, Congressman. I think that the change would be in the noncapital felony case.

Mr. HYDE. That is what I am talking about.

Mr. THORNBURGH. The misdemeanor and capital case are equal.

Mr. HYDE. I am not distressed by giving a defendant a few more peremptory challenges in the felony situation. In the capital cases, I say I don't think we have many of those or are having many.

But other than that, I have no other comment.

Mr. MANN. Thank you, Mr. Hyde.

Mr. Gudger.

Mr. GUDGER. Thank you, Mr. Chairman.

Mr. Thornburgh, you bear the name of a very prominent trial judge in the State of North Carolina. Though I see you for the first time, I will treat you most respectfully, I will tell you.

Mr. THORNBURGH. I haven't done anywhere near the job of searching my "roots" that Mr. Haley did, but I do know that I have roots in the South.

Mr. GUDGER. I hope they go into North Carolina.

Mr. Thornburgh, I am troubled about one aspect of your suggestion concerning the change in peremptory challenges. In my State we have 14 peremptory challenges for the defendant in capital cases and nine for the State; eight in felony and six for the State, and generally we have the same rule, but it is administered by the court more restrictively in misdemeanor cases. So we stand somewhere between the present Federal rule and the proposed Federal rule.

Now, you made the observation on page 11 of your statement, or some suggestion, that there have been some instances where you feel that peremptories have been liberally used and some used as to defeat the ends of justice and create advantage to an accused person.

I know of no such instances from a very wide law practice in my own Western District of North Carolina. Can you give me any specific instances where you feel that the present rule of 10 in capitals is excessive?

Mr. THORNBURGH. I think what that passage refers to is the phenomenon which has only recently surfaced of organizations which hold themselves out to defense attorneys as being able to conduct surveys and polls of communities wherein a trial is to take place in order to provide ammunition to defense counsel who can afford to pay their freight—and it is heavy—to carry out a systematic evaluation of the opportunity for peremptory challenges so as to exclude members of social, cultural, economic, racial, and ethnic groups which their surveys have found to be inimical to the interests of the defendants.

The point is that the more challenges there are, the more opportunity there is for that kind of strenuous influence on the selection of the final 12 or 14, as the case may be, that are in the box.

Mr. GUDGER. But aren't you presenting a hypothetical situation rather than an actual situation?

Mr. THORNBURGH. No.

Mr. GUDGER. Have you had cases like that?

Mr. THORNBURGH. I hesitate to refer to some because they are in litigation, but there was a great deal of attention focused on this in the trial of the former Attorney General John Mitchell and former Secretary of Commerce Maurice Stans in the Southern District of New York where there was a lot of notoriety about the techniques used by a firm in assisting defense counsel and excluding certain classes of jurors from the panel.

Mr. GUDGER. What effort was made by the government to secure a change of venue?

Mr. THORNBURGH. There was no effort in that case. I am not sure that would cure it because the firm would be back with a new survey based on a new control group if that course were to be followed.

Mr. GUDGER. I merely posed the proposition that the district attorney is in a position where he has a social problem peculiar to his jurisdiction. Doesn't he have a recourse to get into another venue for a trial if he cannot get a fair trial for a particular type of case in his particular social circumstance?

Mr. THORNBURGH. I assume probably that would be right, but I think that it would probably be a rare case where the prosecutor would be seeking a change of venue.

Mr. GUDGER. May I raise one other question, Mr. Chairman? I don't want to take an undue amount of time.

This last rule presented in your brief, the warrantless search. We confronted this problem —

Mr. THORNBURGH. If I may correct you, it is not a "warrantless" search. I am rather sensitive to that.

Mr. GUDGER. If you don't mind, we are not going to play on words. We have dealt with this same problem. We have just rewritten our pretrial procedure statutes in the State of North Carolina and my committee handled that, a committee that I chaired, the Criminal Justice Committee in North Carolina.

We dealt with this problem and somewhat sympathetically because we know that there are situations where there is no time to go back to see the magistrate to get the process. But our concern was in our approach to it, we, I believe, considered a requirement that within a

limited period of time after the warrantless search had been completed, that the agent who had phoned in go before the magistrate and sign the transcript and that sort of thing. Is this included in your proposition?

Mr. THORNBURGH. Yes, it is.

Mr. GUDGER. That is No. 1.

No. 2 is, is there a requirement that the magistrate identify the voice of the person who is making the report? Now, this is very critical because otherwise all kinds of fraud could be perpetrated and we have had instances where warrantless entries were made in North Carolina where a felony was believed to have occurred, in a hot pursuit situation and that sort of thing, that have resulted in the killing of some law enforcement officers.

I am concerned with your aspect of it also, you will see. Would you mind commenting on those things?

Mr. THORNBURGH. The counterpart of your practice in North Carolina, I believe, is that a copy of the sworn oral testimony would be signed by the agent in question.

With respect to the voice identification problem, the problem is one of assuring over the phone that the individual who seeks the warrant is, in fact, authorized to seek such a warrant, and that problem is no different than if someone shows up at the magistrate's office face to face with false credentials and seeks a warrant in the conventional way.

There is no way that the magistrate, I submit, can insure 100 percent that the individual seeking the authority to carry out a search is, in fact, a law enforcement official authorized to do so.

Mr. GUDGER. Mr. Chairman, one question and I will conclude.

My point is this: it would be so easy for a policeman on the beat or someone who has no direct personal acquaintance with the magistrate to call up and say:

I have a witness here who says that he knows that someone just sold some heroin to a named person and that he has just gone into his apartment. He was standing outside his apartment.

And there being no identification by the magistrate of that voice, there would be so much opportunity for fraud or deception and there could be a death ensue. That is why I am pressing this point a little bit.

Do you see what I am talking about? There could be an entry made in reliance upon that warrant by someone out there in the field who has acted improperly or by someone who had created a situation deliberately to allow an unlawful entry, where the magistrate if he knew the individual could exert some control. But not knowing him, he could be subjected to a setup out there in the field.

Mr. THORNBURGH. I suppose in the case where a magistrate was suspicious he could ask that the agent's superior or someone else whose voice he did know would vouch for the fact that the individual who represented himself to be an FBI agent was, in fact, that agent.

But there is no foolproof way to establish that identity over the telephone when it is not known to the magistrate any more than there is to establish it face to face when the individual might not be known to the magistrate.

So I suggest that what I am saying, I suppose, is that the problem, while of different quality, is not of any different kind than one has at the present time in securing of warrants.

Mr. GUDGER. Your FBI agents don't still carry their identification?

Mr. THORNBURGH. They do, but I wouldn't want to represent that there wouldn't be an occasion where false credentials could be utilized.

Mr. MANN. Mr. Evans.

Mr. EVANS. I have no questions, Mr. Chairman.

Mr. MANN. Is a copy of a warrant required to be left with the searchee?

Mr. THORNBURGH. Yes, that practice would not vary.

Mr. MANN. So the officer would leave his copy with the owner of the premises. It would be available for comparison with that held by the magistrate.

Mr. THORNBURGH. That's right.

Mr. MANN. I notice that the first section of rule 41 provides for warrants to be issued by magistrates or State judges. That does not extend it to the telephone warrant, however.

Mr. THORNBURGH. That's right. The telephone warrant would encompass only issuance by Federal magistrates or a judge.

Mr. MANN. We have discussed that the looseness of the language of rule 6(e) has permitted judicial interpretation which seems to be leading to grand jury information being made available to other agencies. This was discussed during Mr. Segal's testimony, which you may have heard.

Mr. Segal would impose an additional requirement, if the information is going to be disclosed beyond of the specific requirements of the government attorney's use, that an adversary proceeding be held. You state on page 4 of your prepared statement a very laudable purpose, but I am not at all certain that the proposal is tightly enough drawn to carry out that purpose.

You say:

Let me stress that the amendment will not permit the Department of Justice to take advantage of or make disclosures to investigative agents or experts in order to aid other Federal agencies in conducting their own civil or criminal investigations. Grand juries may not lawfully collect or disseminate evidence intended for use in other proceedings, and a person who is party to such a proceeding * * *

et cetera.

Even though there is a principle there, I am curious about whether or not this statement is really 100-percent accurate with reference to current procedure.

Mr. THORNBURGH. My instincts were the same as yours, Mr. Chairman, and I attempted to clarify in the prepared statement what we meant. But let me see if I can state it orally, what my understanding of the present practice is.

The grand jury investigative process is part of an effort to determine whether or not allegations that are received of criminal conduct are provable to the extent that there is enough legally admissible evidence of wrongdoing by a specified individual or individuals in derogation of specified criminal laws to seek an indictment.

That effort is a team effort. It is carried out by investigative agencies, by the prosecutors and many times through the facilities of the grand jury. As was noted earlier, many times a case is simply pre-

sented to the grand jury and an indictment sought. In other cases, as Judge Becker referred to, the process is an extensive one.

The point that I think the amendment addresses itself to is that in such a team effort all of the evidence should be made available for perusal and analysis to every legitimate member of that team.

First of all, of course, the assistant U.S. attorney who is probably conducting the investigation; such other experts within his office or other Federal investigative agencies that can aid in the analysis of the matters that are being considered; and finally such other investigative personnel as are being utilized in that particular investigation.

Now, when you begin to move beyond the parameters of that particular investigation, we get to the point that you and I both have some trouble with. The cleanest example I can think of where a 6(e) order is clearly required is where a criminal fraud investigation before a grand jury fails to produce enough legally admissible evidence to prove beyond a reasonable doubt that criminal fraud ensued.

It would be the practice of the Department at that time to seek a 6(c) order from the court in order that that evidence could be made available for whatever civil consequences might ensue.

If there were fraud against the Government; for example, there would be a civil right of the Government to recover penalties with respect to the fraud that took place.

The second type of investigation and one that has been focused on as almost a prototype here is with respect to the Internal Revenue Service. They conduct their own criminal investigations without the participation of the Department of Justice, as you're aware, utilizing the summons that is the administrative equivalent of a grand jury subpoena. They also from time to time will utilize the grand jury where responsible officials within the Internal Revenue Service and Department of Justice have decided that that is a proper course to follow.

Again, that is only a criminal investigation. Just as when an IRS investigation into criminal matters falls short of being a referable case to the Department of Justice for prosecution and is closed out criminally and followed out civilly, in the same manner if a grand jury investigation which is looking into tax violations aborts in terms of proving a tax case that is within the confines of the criminal laws, a 6(e) order would be entered or would be sought at that time to make available to the IRS for civil purposes the fruits of the criminal investigation.

In all of those instances and any others that we could discuss hypothetically with respect to agencies such as the SEC and others, there is constantly on the part of the United States Attorney's Office and the Department of Justice an awareness of the compartmentalization of the matters that they are dealing with. That awareness is reinforced by any number of directives and memos to attorneys participating in this, so there will be no meddling or fuzzing at the edges as to what is properly before a grand jury in a criminal sense and what may be ultimately referable to the agency in a civil sense.

There is no byplay while the investigation is going on. Any use of grand jury material made by investigative agencies during the pendency of the grand jury proceedings is in connection with that particular criminal investigation.

I hope that, while a little laborious, may make the point or meet the point that you are concerned about.

Mr. MANN. As I have already stated, it expresses a laudable intent. I just hope we can preserve that intent in the language that we ultimately arrive at.

I have one other comment on a question. Mr. Schulman, in his testimony today concerning peremptory challenges, pointed out, based on certain figures that he had—they admittedly were not nationwide, but they were hopefully not distorted—that the Government—and having been a prosecutor I can believe it—tends to identify certain groups as not conviction-minded.

I could name two or three groups, such as young people for example. They kind of seem to follow a pattern without an expensive sociological investigation. He didn't say this, but I will say that the Government seems to be generally confident with reference to the general run of jurors and yet is able to identify a certain type, not an individual but a type, as not being particularly prosecution-oriented. So the Government would strike them.

His figures indicate that the Government strikes more of certain types of people than defendants do. I think that is human and natural. I think his figures are probably correct. I don't ask you to try to rebut the figures because they are not that important.

What I am getting to is the ultimate philosophical question. Does the principle of an impartial jury embody in any way the necessity of having a proportional jury from any community or any group?

Isn't it appropriate and constitutionally acceptable for the prosecutor or defense counsel to make his choice based on any reason whatsoever? After all, if we wanted a proportional jury, I think we would have to have somebody other than the prosecution or the defense participate in the selection process. Of course, we know the prosecutor or defense counsel doesn't have to explain his challenge to a juror, but are we about to overreact?

As the Supreme Court said in *Swain*, the prosecutor can reject anybody because that person has blue eyes, is Catholic, or whatever. It disturbs me that we are applying a great leveling mechanism to this basic individual right of a citizen. I don't put much stock in the economic reasons given by the advisory committee. I can find no other good reason for the proposed amendment except what we might call this "do-good" approach toward our system.

Do you have any comment?

Mr. THORNBURGH. I would not put the question of peremptory challenges at the top of the Department of Justice's agenda for constructive change. We are not terribly upset with the present system. As you say, and as I seconded, trial lawyers use a lot more intuition and chemistry in selecting jurors than analysis of how they dress or what is the color of their skin or their religion. You guess wrong every once in a while.

I have done it. You kick off the ones you think might turn out to be favorable and you keep on the ones who look like they are dead solid perfect. But that is the way our system works.

As in so many other instances with our adversary system, when you have skilled practitioners on both sides of the table, you are going to

end up through, as the name suggests, peremptory delineation of those people who are in the jury box, with a fair approximation of what is fair just as you end up with a fair approximation of what is truthful in the conduct of the trial itself by adequate representation on both sides.

So I echo your sentiment. I do think that in the Federal court system, in my experience, it would not be an inhibiting factor to adopt the rules that are suggested here and it would reduce in a very crowded Federal court system, one that is gasping for air, the amount of time that might be involved in the selection of a jury panel and there is the safety valve in the important case of a discretionary right to additional challenges.

So I would generally support, and I think the Department generally supports these amendments, not with great fervor but as a rational matter.

Mr. MANN. I agree that a time problem permeates the whole system. I am not sure that the point about the highly professional analysis of jurors is equal to the time problem.

I don't think the other problem has reached to the point where we need to change the rule for that reason.

Mr. THORNBURGH. I wouldn't pay those guys a dime and I don't think you would either.

Mr. MANN. I don't think they make a lot of money in the Southeast. Anyone else?

(No response.)

Mr. MANN. Thank you so much. We appreciate your patience.

Mr. THORNBURGH. Thank you.

STATEMENT OF RICHARD L. THORNBURGH, ACTING DEPUTY ATTORNEY GENERAL

Mr. Chairman and members of the subcommittee: I appreciate this opportunity to present for your consideration the views of the Department of Justice on the proposed amendments to the Federal Rules of Criminal Procedure.

It is the Department's view that the Judicial Conference has done an excellent job in developing these proposed amendments to the criminal rules and we support as drafted all of the proposed amendments.

The Advisory Committee Notes generally make clear the significance of, and the justifications for, the proposed changes, and I shall therefore not undertake to discuss all of the proposals. There are three proposals, however, that warrant discussion at some length from the Department's perspective, namely those involving Rules 6(e), 24(b), and 41(c) (2).

Rule 6(e). Secrecy of Grand Jury Proceedings

Except for the jury's deliberations and the votes of individual jurors, which are always kept secret, Rule 6(e) now contains two general provisions for the disclosure of matters occurring before a grand jury. The first provision allows for disclosure, without a court order, "to the attorneys for the government for use in the performance of their duties." The other provision allows for disclosure by order of the district court "preliminarily to or in connection with a judicial proceeding" or when necessary in connection with motions to dismiss indictments.

The pending amendment to Rule 6(c) proposes to alter the first provision only, so as to include in the current definition of the term attorneys for the government¹ "such other personnel as are necessary to assist the attorneys for the government in the performance of their duties."

¹ "Attorneys for the government" is presently defined in Rule 54(c) to mean the "Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney", and equivalent persons with respect to cases arising under the laws of Guam.

In our view this proposal is of a clarifying rather than a substantive nature. It has long been the Department of Justice's interpretation of the existing provision, supported by decisions of federal appellate courts, and an attorney for the government, upon his own authority and without an order from the court, may make certain disclosures to investigatory personnel for the purpose of discharging his duties as a government attorney. See, e.g., *United States v. Evans*, 526 F.2d 701, 707 (C.A. 5, 1976); *United States v. Hoffa*, 349 F.2d 20, 43 (C.A. 6, 1965), *aff'd*, 385 U.S. 293 (1966). The Notes of the Advisory Committee confirm that the intent underlying the proposed change is simply to codify present practice. The Notes point out that "there is often government personnel assisting the Justice Department in grand jury proceedings", and go on to observe that although the "case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their expertise is required." This proposed amendment is thus designed merely to adopt the present trend of case law governing this aspect of Rule 6(c) disclosure.

We understand that some persons are concerned that the proposed amendment will further the possibility of unwarranted breaches of grand jury secrecy and improper use of grand jury evidence. I want to assure this Subcommittee that the Department has a jealous regard for grand jury secrecy and would not wish the present restrictions to be eroded. In our view, however, the proposed amendment will not have any such effect. Rather, by recognizing the realities of present practice, necessity, and case law, it serves to clarify what has been a persistent and perplexing source of confusion.²

Let me stress that the amendment will not permit the Department of Justice to take advantage of or to make disclosures to investigate agents or experts in order to aid other federal agencies in conducting their own civil or criminal investigations. Grand juries may not lawfully collect or disseminate evidence intended for use in other proceedings, and a person who is a party in such a proceeding, brought against him by another government agency and related to the subject matter of a prior grand jury investigation, may properly move to suppress any evidence, and the fruits thereof, found by the court to have been used against him in violation of the principle. See, e.g., *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683-684 (1958); *Coson v. United States*, *supra*, 533 F. 2d, at 1120. Moreover, both under this amendment and now, any improper disclosure by an "attorney for the government" would constitute a serious breach of grand jury secrecy that is punishable as a contempt of court. See *United States v. Dunham Concrete Products, Inc.*, 475 F. 2d 1241, 1249 (C.A. 5, 1973), *cert. denied*, 414 U.S. 832 (1973); *United States v. Hoffa*, 349 F. 2d 20, 43 (C.A. 6, 1965), *aff'd*, 385 U.S. 293 (1966); *United States v. United States District Court*, 238 F. 2d 713, 731 (C.A. 2, 1956), *cert. denied*, 352 U.S. 981 (1957); *United States v. Schiavo*, 375 F. Supp. 475, 478 (E.D. Pa., 1974); *United States v. Smyth*, 104 F. Supp. 283, 292-293 (N.D. Cal., 1952).

The question may be posed as to why the Department of Justice needs routine authority to make disclosures to investigative agents and the like. These disclosures serve the primary purpose of preparing the attorney for the government in going before the grand jury and presenting the investigation in an orderly fashion. Frequently, the prosecutor is in possession of evidence, e.g., fingerprint or voice comparisons, or books and records of complex financial or tax transactions, that neither he, nor the laymen constituting the grand jury, can adequately comprehend without the assistance of expert help in the form of Internal Revenue Service or FBI agents trained at unraveling such complexities. Disclosure to these agents then becomes a matter of necessity in order to make sure that significant evidence is not overlooked or that, through a misapprehension of the evidence, an unwarranted indictment is not returned. As

² For example, in some instances because of the uncertainty surrounding the interpretation of Rule 6(e) in a particular district or circuit, government attorneys have obtained court orders to disclose grand jury materials to agents assisting in the investigation out of an abundance of caution. There have also been cases where the subpoenaed party has asked the court for some limiting order to protect his interests. See *United States v. Universal Manufacturing Co.*, 525 F. 2d 808 (C.A. 8, 1975), unholding a relatively broad disclosure of materials to the FBI. But see *J. R. Simplot Co. v. United States District Court for the District of Idaho*, C.A. 9, decided November 12, 1976, vacating a district court order as being impermissibly broad. The Department of Justice has petitioned for a rehearing of this case, with suggestion for a rehearing en banc, partly on the basis that the decision conflicts with two recent decisions in the same circuit. See *Coson v. United States*, 533 F. 2d 1119 (C.A. 9, 1976) and *Witte v. United States*, 544 F. 2d 1026, 1029 (C.A. 9, 1976).

a court of appeals recently declared in upholding a district court's refusal to issue a protective order to prevent IRS agents from seeing subpoenaed materials, "[the] agent's special knowledge and skill in examining corporate records were deemed a legitimate as well as an advisable resource in the United States Attorney's conduct of an investigation of possible crime." *Coson v. United States*, 533 F.2d 1119, 1121 (C.A. 9, 1976) (emphasis added). See also *United States v. Dunham Concrete Products, Inc.*, *supra*, 475 F.2d, at 1247, 1249 (sustaining disclosure, without a court order, of grand jury matters to a Department of Justice economist). Having made such disclosures to government agents or experts assisting him, the government attorney may then bring the agents or experts before the grand jury to explain the pertinent aspects of their findings, or the assistance of the agents may prove valuable in framing questions to other persons testifying before the grand jury. In addition, disclosure of grand jury evidence to investigative agents is often necessary to permit the agents to conduct interviews and otherwise pursue leads suggested by such evidence. An investigation, of course, does not cease with the start of the presentation of evidence to a grand jury, nor even, necessarily, with the return of an indictment. It is thus frequently appropriate, "in the performance of their duties", for attorneys for the government to make disclosures to law enforcement agents to assist the attorney in the continuation of a criminal investigation.

In short, disclosures by federal prosecutors to other persons whose assistance is needed in presenting or evaluating evidence for use in a grand jury proceeding or in pursuing the criminal investigation to its conclusion is essential in a large number of cases in order to permit the government attorney and the grand jury to perform their duties in a responsible and just manner. To require a court order in each instance in which such a disclosure is sought to be made would unnecessarily burden the courts with thousands of applications each year. See *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1127 (E.D. Pa. 1976). This burden is not justified by the record, which historically shows very few occasions in which this power has been misused. Moreover, for those rare instances the penalty of contempt and the remedy of suppression of evidence afford adequate means of redress. We thus support the proposed amendment to Rule 6(e) to clarify the extent of the prosecutor's disclosure authority in this area.

Rule 24(b). Peremptory Challenges

At present, Rule 24(b) provides that in a capital case each side is entitled to 20 peremptory challenges; that in a non-capital felony prosecution, the defendant or defendants jointly are entitled to 10 peremptory challenges while the government is entitled to 6; and that in a misdemeanor prosecution each side has 3 peremptory challenges. In addition, the Rule permits the court to grant additional peremptory challenges to the defendants, but not to the government, in any case.

The pending amendment would both reduce and equalize, as between the government and the defense, the number of peremptory challenges. In a capital case, each side would have the right to exercise 12 peremptory challenges; in a felony prosecution, the number of peremptories available to each side as a matter of right would be 5; and in a misdemeanor case, each side would be entitled to 2 peremptory challenges. For good cause shown, the court could grant additional peremptory challenges, not necessarily on an equal basis, to either the government or the defendant or both.

A peremptory challenge, of course, unlike a challenge "for cause", permits a party in a criminal case to excuse a prospective juror during pre-trial voir dire examination (usually conducted by the court) for any reason, and indeed normally without a reason being stated. See *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

Although nothing in the Constitution requires the Congress or the State to permit any peremptory challenges, *Swain v. Alabama*, *supra*, 380 U.S., at 219, nonetheless, the challenge, by virtue of its roots in English common law and its persistent use in this country dating from colonial to modern times in both the federal and State criminal justice systems, has become established as a vital and necessary part of trial by jury. See *Swain v. Alabama*, *supra*, 380 U.S., at 212-219, recounting the history of peremptory challenges.

At the same time, while the right to peremptory challenges is undeniably still an integral feature of the federal criminal justice process* which few have

* As the Court in *Swain v. Alabama* noted, by contrast the peremptory challenge in England has fallen into disuse.

proposed to abolish, the trend in our law, evidenced by periodic Acts of Congress on the subject since 1790, has been in the direction of a reduction and equalization of the number of such challenges. The States have followed a parallel course. *Sicain v. Alabama*, *supra*, 380 U.S., at 214-217. Thus, the proposed amendment to Rule 24(b) is consistent with the historical trend regarding the exercise of peremptory challenges.

The Department of Justice perceives the issues surrounding the pending amendment to Rule 24(b) as twofold: first, should the number of peremptory challenges available as a matter of right to the parties be the same; and second, should the number of such challenges be reduced from their present levels. We answer both questions in the affirmative.

Equalization of the number of peremptory challenges available as a matter of right to both sides in a criminal case is in accordance with the basic purpose of the peremptory challenges. As the Supreme Court has stated (*Sicain v. Alabama*, *supra*, 380 U.S., at 219-220):

The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136. Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause. Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee "not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes v. Missouri*, 120 U.S. 68, 70.

Further, as the Advisory Committee's Note observes: "Proper use of peremptories by the government can contribute to a fair trial as effectively as proper use by the defendant." Since the government, which represents the public in criminal cases, is entitled no less than the defendant to a fair trial, it seems appropriate to permit both the government and the defendant to exercise, at least initially as a matter of right, an equal number of peremptory challenges. Indeed, the inequality that exists under current Rule 24(h) with respect to the number of peremptories available in non-capital felony cases (10 for the defendant; 6 for the government) is not justifiable in terms of any apparent policy embodied in the Rule itself. Under the present Rule, each side is entitled to an equal number of peremptory challenges in capital cases (20) and in misdemeanor prosecutions (3). There is no evident reason for the disparity with regard to non-capital felonies. Moreover, as the Advisory Committee Note has indicated, Congress "adopted the principle of equality in its most recent legislation dealing with the question, the District of Columbia Court Reorganization Act of 1970." See 23 D.C. Code 105.

In our view, it is also appropriate to reduce the number of peremptory challenges afforded to the parties in criminal cases. For one thing, as the Advisory Committee Note points out, echoing the sentiments of other commentators, such a reduction will accelerate the voir dire process and permit the use of smaller jury panels, thereby leading to substantial savings in public monies. See also *Sicain v. Alabama*, *supra*, 380 U.S., at 216 and authorities cited at footnote 19. In addition, the present levels of peremptory challenges, in felony cases particularly, do not adequately guard against the phenomenon, whose incidence seemingly is on the rise today, of systematic elimination of members of a given class, race or group from the jury panel. As I am sure members of the Subcommittee are aware, it has become a frequent practice for criminal defendants charged with political corruption or white collar offenses who are financially able to do so to commission sociological studies and opinion polls to determine the attitudes of particular segments of the community in which their trial is being held as a basis for utilizing peremptory challenges. Opinions may be sampled and collated according to such factors as race, color, religion, sex, national origin, economic status, and the like. In some instances, such studies coupled with the judicious exercise of peremptory challenges, have apparently been successful in permitting defendants to shape the ultimate trial jury and thereby augment the chances of a favorable verdict.

As the Advisory Committee Note indicates, this kind of utilization of the peremptory challenge right is inconsistent with the policy expressly stated by Congress in the Jury Selection and Service Act of 1968 that "all litigants" shall have the right to juries selected at random from a fair cross-section of the community, without any citizen's being excluded from service on the ground of race, color, religion, sex, national origin, or economic status. See 28 U.S.C. 1861, 1862. Moreover, the increasing tendency of would-be defendants to take advantage of such sociological and opinion polls will undoubtedly fuel claims by indigent defendants to have such polls conducted in their cases at public expense. Pressures, heretofore resisted by United States Attorneys and the litigating Divisions of the Justice Department, will also mount on federal prosecutors to use public funds to conduct like surveys to guide their own exercise of peremptory challenges in important cases.

In our view it is important to resist the growth of this unhealthy phenomenon, which threatens to demean, and undermine the perceived fairness of, our criminal justice system. Using peremptory challenges systematically to try to mould the composition of a jury by eliminating members of certain classes or ethnic groups—even if such elimination proceeds from erroneous premises as to the attitudes of these groups and does not lead in all cases to a favorable result—portrays the criminal justice system in a bad light, not as a system where the verdict is primarily dependent, as it should be, upon the quality of the evidence presented and the judge's instructions on the law, but upon whether the "proper" racial or cultural makeup of the jury can be obtained.

This phenomenon can continue, however, only so long as the number of peremptory challenges remains, as it is today, at sufficiently high levels to permit effective manipulation of the jury panel. Thus, a reduction in the number of peremptory challenges available to both sides, particularly as it applies to felony prosecutions, is a proposal we look upon with favor, in part because it is a means of preventing resort to improper methods of juror "selection" by the parties.

Rule 41(c)(2). Search Warrant upon Sworn Oral Testimony

Presently a search warrant may issue under Rule 41(a) of the Federal Rules of Criminal Procedure only upon the request of an attorney for the government or a federal law enforcement officer authorized to apply for a search warrant. Under Rule 41(c), issuance of a search warrant requires a showing of probable cause by means of an affidavit sworn to before the magistrate or judge. Under Rule 41(d), an officer seizing property pursuant to a warrant must give the person from whom or from whose premises the property is taken a copy of the warrant. Because the federal law enforcement officer requests issuance of the warrant, executes the supporting affidavit, or needs to have a copy of the warrant in his possession, the officer must generally go the place where the magistrate or judge is sitting if he is to conduct a search under the authority of a warrant.

The proposed amendment would create a new method of obtaining a search warrant. In limited circumstances, it would authorize issuance of a warrant over the telephone or by other appropriate means of communication. The amendment would not repeal any existing provision of Rule 41, nor would it change the grounds for issuance of a warrant. Furthermore, the amendment would not do away with the search warrant as a document to be carried by an officer making the search.

Issuance of search warrants through the medium of the telephone or otherwise under this amendment would be authorized only "when the circumstances make it reasonable to do so." Otherwise, present procedures would be followed. Proposed Rule 41(c)(2) could be used only by a "federal magistrate," a term that of course includes a federal judge. The procedure would not be available, however, to the issuance of a federal search warrant by a State judge.

If the federal magistrate found that the circumstances justified employment of this new procedure, he would hear testimony communicated to him by telephone, radio, or other suitable means. The magistrate must record the sworn oral testimony and have it transcribed. He must then certify the transcription and file it with the court. Sworn oral testimony thus recorded and transcribed would be deemed an affidavit for purposes of Rule 41.

Under the proposed amendment, if the federal magistrate is satisfied that grounds for issuance of a warrant exist, a written search warrant would be drawn up, subject to all the present requirements as to the contents of search warrants. The federal officer or government attorney requesting issuance would

be required to read the contents of the proposed warrant, verbatim, to the magistrate. The magistrate could direct the making of specific modifications in the warrant. Once the form has been approved, the magistrate would direct the federal agent or government attorney to sign the magistrate's name on the warrant, which would then be regarded as a duplicate original warrant. The magistrate's name on the warrant, which would then be regarded as a duplicate original warrant. The magistrate would make out his own warrant, which would be regarded as the original warrant, upon the face of which he would be required to enter the exact time of his issuance of the duplicate original.

This type of warrant would be returned in conformity with existing law (Rule 41(d)), with one additional requirement. Upon return, the person who gave the sworn oral testimony would have to sign a copy of the transcribed testimony.

The extensive Advisory Committee Note, I believe, demonstrates that the procedure under the amendment is an essential equivalent of the present procedure. To be sure, there would not be face-to-face contact with the affiant, and the magistrate would have to work a little harder than if he had in hand a written affidavit to read; but we share the Advisory Committee's confidence that the amendment can be implemented without serious difficulty.

In the Department of Justice's judgment, moreover, the proposed amendment is clearly desirable. The Supreme Court has often indicated that even when circumstances permit law enforcement officers to conduct searches without warrants, search warrants should be obtained whenever it is reasonably practical to do so. E.g., *Chimel v. California*, 395 U.S. 752, 758 (1969); it is not difficult to appreciate why the warrant procedure is preferred. A magistrate can judge the facts from a more objective viewpoint than can a law enforcement agent or a prosecutor. Thus, interjecting a judicial officer into the determination of probable cause tends to further the protections accorded to individuals under the Fourth Amendment to our Constitution. In addition, persons who are on the scene when a search and seizure occurs may accept the situation more readily when a written, authoritative document is used than when the officer acts on his own. Furthermore, if the magistrate holds that there is not sufficient cause for issuance of a warrant, this may help the officer. He may be able to obtain the additional information needed to justify a search, and may then succeed in making a case that would have been ruined if he had acted precipitously.

The proposed amendment will undoubtedly have the effect of rendering it more practical for search warrants to be secured, and will thus reduce the incidence of warrantless searches. It will also be of considerable aid to federal law enforcement agents in resolving difficult practical and legal problems in search and seizure situations.

As the Advisory Committee Note points out: "Federal law enforcement officers are not infrequently confronted with situations in which the circumstances are not sufficiently 'exigent' to justify the serious step of conducting a warrantless search of private premises, but yet there exists a significant possibility that critical evidence would be lost in the time it would take to obtain a search warrant by traditional means." In such instances, the proposed amendment will create a procedure whereby both the interests of the individual under the Fourth Amendment and of society in investigating probable criminal activity can be harmonized.

Even where exigent circumstances might in retrospect be found to have existed, the procedure under the amendment will be of benefit since law enforcement officers will have the means, and will thus be encouraged, to opt for the safer legal course of trying to obtain a search warrant before taking unilateral action. If a team of agents is surveilling a movable vehicle thought to contain stolen goods, for example, one can be dispatched to telephone or radio a magistrate for a warrant under the new procedure, while the others remain at their posts ready to make a warrantless search if circumstances dictate the necessity or advisability of doing so prior to the time a warrant can be obtained. While it is possible to employ this tactic today, the time ordinarily required to obtain a warrant renders it seldom feasible. Cf. *United States v. Bozada*, 473 F.2d 339 (C.A. 8 1972) (en banc), cert., denied, 411 U.S. 969 (1973). Under the proposed amendment, I would expect that such a procedure would become more commonplace.

The telephonic search warrant process, which is presently the law in Arizona and California, has rightly been considered to be constitutional by both courts and commentators. See, e.g., *People v. Peek*, 38 Cal. App. 3d 993, 999-1000 (D.Ct. App. 1974); *State v. Cymerman*, 343 A. 2d 825, 828-829 (Super. Ct. N.J. 1975); Israel, *Legislative Regulations of Searches and Seizures; The Michigan Proposals*, 73 Mich. L. Rev. 221, 260 (1975). It is the conclusion of the Department of Justice that the proposal fashioned by the Judicial Conference deserves support as an amendment that will both facilitate effective law enforcement while fortifying the Fourth Amendment safeguards of the individual.

Mr. Chairman, that completes my prepared remarks, and I would be pleased to try to answer any questions of the Subcommittee at this time.

Mr. MANN. One further procedural matter before we recess: We have received several letters and statements for inclusion in the record of our proceedings on the pending amendments to the Federal Rules of Criminal Procedure. Without objection, the following items will be made a part of the record: first, a statement submitted by Representative Steven D. Symms; second, a statement submitted by Jolin F. McClatchey, Esquire, of Cleveland, Ohio; third, a letter dated February 17, 1977, from Irwin H. Schwartz, Federal Public Defender for the western district of Washington; fourth, a letter dated February 16, 1977, from Frank O. Bell, Jr., Chief Assistant Federal Public Defender, northern district of California; and fifth, a letter dated February 18, 1977, from Lucien B. Campbell, Federal Public Defender, western district of Texas.

Each member was sent a copy of these letters yesterday afternoon. If there is no objection, these items will be made a part of the record. Hearing no objection, the five items are a part of our record.

[The letters and statements follow:]

STATEMENT OF HON. STEVEN D. SYMMS, TO THE SUBCOMMITTEE ON CRIMINAL JUSTICE, HOUSE COMMITTEE ON THE JUDICIARY

REGARDING THE PROPOSED AMENDMENT TO RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

SUBMITTED ON FEBRUARY 18, 1977

Mr. Chairman and Members of the Subcommittee: At the present time, Rule 6(e), Federal Rules of Criminal Procedure provides in pertinent part as follows:

"Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties."

On April 26 the Supreme Court promulgated a series of proposed amendments to the Federal Rules of Criminal Procedure. 4549 *et seq.* Included therein is a proposed amendment to F.R.Cr.P. (Rule 6(e)). Rule 6(e), with that proposed amendment, would read in pertinent part:

"Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. For purposes of this subdivision, 'Attorneys for the government' includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." (proposed amendment emphasized)

The underlying purpose of the proposed change, the thrust of which—though not its language—is to permit the attorneys for the Government as defined in Rule 54(c)¹ to obtain expert help from other Government personnel where their expertise is required.

The issue posed by the proposed amendment is when, to what degree, and

¹ "Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General For Guam or such other person or persons as may be authorized by the laws of Guam to act therein.

pursuant to what conditions grand jury secrecy must give way to the asserted practical need for expert technical assistance by the attorneys certified to the grand jury.

The proposed Rule, which contemplates access to grand jury transcripts, as well as documentary material, in effect permits administrative agency personnel to be present in the grand jury room despite the structures of Rule 6(d).² Administrative personnel thus are kept physically out of the room but may have access to all that happens there except the grand jury's deliberation and vote. Moreover, this would occur despite the assurances typically given to witnesses that only those persons in the grand jury room know what transpires there. What has developed, and what would be perpetuated by the proposed amendment, is a grand jury system having only a show of secrecy.

The temptations encouraged by the proposed amendment are obvious and easily illustrated. Over the past few years, it has become increasingly common to start an administrative investigation and, before it is completed, for the administrative agency to ask the local U.S. Attorney to convene a grand jury to investigate the same matter. The agency personnel who have worked on the matter are then made available to the U.S. Attorney to assist in directing the grand jury. The U.S. Attorney may know little about the investigation and relies totally on the administrative agency personnel. In effect, the grand jury is made a tool of the administrative agency as a method to continue the administrative investigation to pursue both civil and criminal investigatory objectives.

The advantages from the Government's view are significant, even when the agency involved has its own broad investigatory and compulsory process powers. The administrative agency is enabled to use the grand jury's process to obtain documents and testimony. The grand jury proceedings are secret and the witnesses before the grand jury have less rights than those appearing before administrative agencies. The usual Fifth Amendment and Due Process safeguards are not allowed in the grand jury process. One need not know he is being investigated; one need not know the charges against him; one may not have counsel in the grand jury room; one may not guard his testimony with a Fifth Amendment privilege, as it may be compelled by the use of immunity. The Government can insulate both the course of the investigation and the extent of the information learned by waving the flag of secrecy, even though secrecy has become a one-way street. The result is that there is a significant imbalance in favor of the government in preparation for trial, and the proposed amendment would increase that imbalance.

There is something hypocritical at best in a grand jury system that on the one hand assures that no unauthorized person, including counsel for witnesses and targets, is permitted in the grand jury room but yet permits the attorneys certified to the grand jury to make wholesale disclosures of grand jury proceedings to other Government personnel without any real judicial review as long as the attorneys feel that such disclosure may be helpful to permit them to perform their duties. The proposed amendment to the Rule euts the tension between grand jury secrecy and the limited need of the Department of Justice, with its vast resources, for additional outside assistance in needless fashion and without adequate consideration.

Thus, given the important interests involved in this matter, at a minimum the proposal should be changed to permit assistance by government personnel only when a particularized and compelling need arises. That disclosure should then be limited, both as to the number of personnel used by the government and to the amount of transcripts or documents shown to the government personnel. Those recipients of the secret testimony and documents should then be precluded from giving any testimony in future grand jury proceedings or criminal proceedings involving matters considered by the grand jury. They should further be precluded from having any role in future civil proceedings involving matters considered by the grand jury.

While I do not mean the foregoing to be exhaustive, I hope it does illustrate the serious potential that the ambiguous proposed amendment to the present

² "(d) Who May Be Present. Attorneys for the government, the witnesses under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting. As amended Feb. 23, 1966, 383 U.S. 1096, eff. July 1, 1966."

Rule has of abrogating traditional and constitutional notions of grand jury secrecy.

Thank you for your consideration.

STATEMENT OF JOHN F. McCLATCHEY, MEMBER OF THE OHIO BAR

My name is John F. McClatchey. I have been a member of the Ohio Bar since 1957, and am presently a member of the Bars of the United States District Court, Northern District of Ohio; of the Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuits, United States Courts of Appeals; and of the United States Supreme Court. I have been in active practice in the antitrust area since 1960, and am presently Chairman of the Antitrust Law Section of the Ohio State Bar Association (although I submit these comments in a personal capacity and not on behalf of that Section or the Bar Association). Since 1960, I have represented numerous companies under investigation by antitrust grand juries, have followed developments in the criminal antitrust area, and have defended two criminal antitrust prosecutions: *U.S. v. Aeroquip Corporation*, 284 F.Supp. 114, 1968 CCH Trade Cases ¶ 72,450 (E.D. Mich. 1968); and *U.S. v. Bensinger Co., et al.*, 430 F.2d 584, 1970 CCH Trade Cases ¶ 73,260 (8th Cir. 1970).

I respectfully submit the following comments on the proposed amendment to Rule 6(e):

A. SUMMARY

My major suggestion regarding the proposed amendment is that, if any amendment to Rule 6(e) is to be made, it be coupled with (1) liberalization of the Jencks Act and (2) a requirement that access by non-lawyers to grand jury documents and transcripts of testimony be permitted only upon Court order for good cause shown following notice to each person whose testimony or Documents are involved.

B. DISCUSSION

1. At the present time, Rule 6(e), F.R.Cr.P. provides in pertinent part as follows:

"Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties."

Rule 54(c), F.R.Cr.P. provides:

"As used in these rules the term . . . 'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein."

On April 26, 1976, the United States Supreme Court approved (subject to review by Congress) the following amendment to Rule 6(e):

"Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. For purposes of this subdivision, 'attorneys for the government' includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." [Proposed amendment in *italics*.]

Under the proposed amendment, non-lawyers would, without prior notice to witnesses or to persons from whom documents were obtained and without prior Court order, be permitted to examine transcripts of testimony of witnesses before a Grand Jury and documents produced before the Grand Jury pursuant to subpoena *duces tecum*.

2. In practice, the phrase "matters occurring before the grand jury" means:

(a) Documents produced before the Grand Jury pursuant to subpoena *duces tecum* ("Grand Jury Documents").

(b) Transcripts of testimony of witnesses before the Grand Jury ("Grand Jury Transcripts").

In general, it is much easier for a criminal antitrust defendant to gain access to Grand Jury Documents than to Grand Jury Transcripts.

(a) *Grand Jury Documents*. Rule 16(b) provides as follows:

"Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers,

documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a), (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500."

In practice, at the time an antitrust indictment is issued, government attorneys normally obtain from the court an order impounding all documents produced before the Grand Jury, and defense counsel normally obtain early and full access to those documents under Rule 16(h).

(b) *Grand Jury Transcripts.* There are several ways in which criminal antitrust defendants can seek access to Grand Jury Transcripts:

(1) The Jencks Act, 18 U.S.C.A. Section 3500, provides as follows:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(h) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however, taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

In practice, district judges in criminal antitrust cases either have applied the Jencks Act to deny access by defense counsel to a trial witness' Grand Jury testimony until after the witness' direct testimony at trial (as in the *Bensinger* case referred to above), or have permitted such access only shortly before the direct testimony is given at trial (as in the *Aeroquip* case referred to above—2 days in advance).

(ii) Rule 16(a)(3), F.R.Cr.P., provides as follows:

"Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . (3) recorded testimony of the defendant before a grand jury."

Individual defendants in antitrust cases have not used Rule 16(a)(3) because they have not normally testified on substantive matters before the Grand Jury (those who do so testify normally obtain immunity and are not prosecuted). Corporate defendants have had varying degrees of success in obtaining access to Grand Jury testimony of their present and former officers and employees under Rule 16(a)(3).

3. An Antitrust Grand Jury normally runs for a year or more, and usually proceeds initially by subpoenas *duces tecum* directed to companies under investigation, then to testimony of present and former officers and employees of those companies and of suppliers, competitors and customers, then to report and recommendation to the Assistant Attorney General by the Government lawyers conducting the Grand Jury, and then to indictment. Government lawyers consequently have many months to examine and absorb the contents of all Grand Jury Documents and all Grand Jury Transcripts, and normally have, or are able to have, their case well-prepared by the time the indictment is issued.

While defense counsel may cooperate with each other during the course of the Grand Jury investigation by exchanging copies of Grand Jury Documents and the contents of debriefing statements, defense counsel in many instances do not cooperate with each other at all, and even where they do, such cooperation is an imperfect substitute at best for the government lawyers' access to all documents and all transcripts of actual testimony.

The result is that there is a significant imbalance in favor of the government attorneys in preparation for trial of a criminal antitrust case, and the proposed amendment would increase that imbalance.

4. A major concern of any company under investigation by an antitrust Grand Jury is leaks: that the company is being investigated, or that the contents of its documents will be disclosed, or that the identity and testimony of its officers and employees testifying before the Grand Jury will become known. The government lawyers conducting an antitrust Grand Jury are more likely than non-lawyers to understand the seriousness of the secrecy obligation and to avoid intentional or unwitting disclosure of proceedings before the Grand Jury. The proposed amendment to Rule 6(e) increases the risk of leaks, and it is likely to make companies and individuals less inclined to cooperate and be forthright in the Grand Jury investigation.

5. It is possible that a non-lawyer who examines Grand Jury Transcripts and Documents will later testify at trial. Where this occurs, a serious risk arises that the non-lawyer will shape his testimony to take account of what he has learned from the Transcripts and Documents.

6. In summary, there appears to be no good reason for exposing Antitrust Grand Jury Transcripts and Documents to anyone other than the government attorneys conducting the Grand Jury investigation:

- (a) government attorneys are present when Grand Jury testimony is taken;
- (b) they have many months and normally at least over a year before trial to review and absorb Grand Jury Documents and Testimony;
- (c) they must review both Testimony and Documents thoroughly in order to present their case at trial;

(d) they already possess a great advantage over defense counsel with respect to Transcripts so long as the Jencks Act is in effect;

(e) the prospect of disclosure of Transcripts and Documents to non-lawyers, without prior notice or court approval, will undermine public confidence in the secrecy of Grand Jury proceedings.

One additional factor suggesting restraint in further strengthening the government's hand in the criminal antitrust area is the 1974 amendment to the Sherman Act by which violation of that statute is made a felony punishable by a maximum of three years imprisonment and a \$100,000 fine for individuals, and a maximum \$1,000,000 fine for corporations. 15 U.S.C.A. §§ 1, 2 and 3, as amended. Prior to this amendment, violation was a misdemeanor punishable by a maximum of one year imprisonment and a maximum \$50,000 fine for both individuals and corporations.

If any modification of the existing rule is to be made, it should be coupled with liberalization of the Jencks Act and a requirement that access by non-lawyers to Transcripts and Documents be permitted only upon Court order for good cause shown following notice to each person whose testimony or documents are involved.

FEDERAL PUBLIC DEFENDER,
WESTERN DISTRICT OF WASHINGTON,
U.S. COURT HOUSE,
Seattle, Wash., February 17, 1977.

HOUSE SUBCOMMITTEE ON CRIMINAL PROCEDURE,
Sam Rayburn Office Building,
Washington, D.C.
(Attention of Thomas Hutchison.)

DEAR MR. HUTCHISON: I would like to express my thoughts on the current voir dire procedures in federal criminal cases in light of the subcommittee's consideration of proposed Rule 24 of the Federal Rules of Criminal Procedure.

At the present time in this district, the jury selection plan passes muster under both statutory and constitutional standards. Nonetheless there is a definite and unfortunate underrepresentation of non-whites and young persons, for persons in these groups are frequently excused because of the hardship which would result from jury service. This, of course, presents a major problem in obtaining an appropriate cross-section of the community to serve in a criminal case. Reduction of the number of peremptory challenges permitted the defense will only aggravate the situation.

In this district present jury selection procedures consume only one-half to one-hour of the court's time. The reduction in the number of challenges permitted would save no more than five to ten minutes of that period. It would seem therefore that there is little to be gained and much to be lost under the terms of proposed Rule 24.

Very truly yours,

IRWIN H. SCHWARTZ,
Federal Public Defender

FEDERAL PUBLIC DEFENDER,
NORTHERN DISTRICT OF CALIFORNIA,
FEDERAL BUILDING,
San Francisco, February 16, 1977.

HON. JAMES R. MANN,
Subcommittee on Criminal Justice, House Committee on the Judiciary, House
Office Building, Washington, D.C.

MY DEAR CONGRESSMAN MANN: I understand that your subcommittee will soon be considering proposed changes in Rule 24, Federal Rules of Criminal Procedure, as it relates to the number of peremptory challenges in criminal cases.

As you know, it is the general practice in federal courts for the trial judge to conduct the questioning of the jury, after considering questions proposed by the parties. Rarely is counsel permitted an opportunity to pose questions to potential jurors. While I am confident that most judges conscientiously seek to obtain a fair minded jury, there are obvious limitations inherent in a system which, for all practical purposes, precludes the type of personalized *voir dire* traditional in state courts in California. To further limit the parties' rights to challenge the fairness of a potential juror by such a restriction on peremptory challenges must adversely affect the integrity of the jury system.

From a practical viewpoint, such a limitation on peremptory challenges may effect a greater consumption of trial time than is presently used in jury selection. If such challenges are limited to five (and the usual practice of requiring joint exercise in multi-defendant cases is followed), most counsel will be required to insist on more detailed *voir dire* examination to support challenges for cause. It has been my experience that in the routine cases, challenges for cause are seldom exercised, not because good reasons for rejection do not exist, but because it is simpler to remove the juror by peremptory challenge.

Additionally, I do not feel that the minimal time saved by a reduction of defense peremptory challenges is worth the threat to what many consider the public's last stronghold against governmental oppression. Traditionally, it has been the absolute right to trial by jury that has maintained in many citizens continued respect for our judicial system. The importance of preserving this right must be paramount to the expediency of saving perhaps a half hour of court time. Those of us having daily contact with the criminal justice system are mindful of the tremendous drain on our courts and judges, but we cannot erode the right to an impartial jury simply to speed up the trial process. We should remember William Pitt's words: "Necessity has been the plea for every

infringement of human freedom. It is the argument of tyrants; it is the creed of slaves."

I urge your subcommittee to oppose the reduction of peremptory challenges contained in proposed Rule 24; should your subcommittee approve of the reduction, I would suggest that each defendant tried should have a right to exercise five challenges.

Respectfully submitted,

FRANK R. BELL, Jr.,
Chief Assistant, Federal Public Defender.

FEDERAL PUBLIC DEFENDER,
WESTERN DISTRICT OF TEXAS,
FEDERAL BUILDING,
San Antonio, Tex., February 18, 1977.

HON. JAMES R. MANN,
*Chairman, Subcommittee on Criminal Justice, House Committee on the Judiciary,
House Office Building, Washington, D.C.*

DEAR CONGRESSMAN: It is my understanding that the Subcommittee on Criminal Justice which you chair will consider the above referenced change to the Federal Rules of Criminal Procedure next week. The proposal, as you are aware, would decrease the number of peremptory challenges in every grade of criminal case, and place the government and the defendant at parity in felony cases, with each side entitled to five peremptory challenges.

I take this opportunity to present my views in opposition to the proposed rule.

The right to trial by jury is a substantial right, and of course a distinguishing feature of our criminal jurisprudence. In my opinion the value of that right is already diminished by practice under the rule permitting solely judge-conducted examination of prospective jurors. I arrive at my views with perspective of five years' experience as a state court prosecutor, prior to assuming my present position within the federal system. In Texas courts, attorneys are permitted to address the jury panel generally, and to make individual inquiry of prospective jurors in order to explore possible grounds for challenge for cause, and to enable them to use peremptory challenges in an informed, intelligent manner.

It is only by the experience gained in those years of personally addressing prospective jurors, and by judicious use of the challenges provided by the existing Rule 24, that I believe myself able to seek effectively an impartial trial jury in federal court. The value of the right to trial by jury should not be further diminished by decreasing peremptory challenges below a number sufficient to provided a reasonable expectation of selecting an unbiased jury.

The biased juror is the bane of the system. The juror who decides a criminal case on his own prejudices, rather than on available evidence and applicable law, is the "joker in the deck," which both sides seek to eliminate. Any minimal savings in court time and juror utilization gained by amendment of the rule would, in my opinion, likely be offset many times over by the increased likelihood of hung juries and costly retrials. Also to be considered is the potential increase in appellate litigation of trial court rulings on challenges for cause, which might result from decreasing peremptory challenges below a reasonable level.

I urge the Subcommittee to resist the illusion of false judicial economy which the revision might offer, and to oppose any further erosion of the real value of the institute of trial by jury.

Thanking you in advance for your consideration of these views, I remain

Very truly yours,

LUCIEN B. CAMPBELL, *Federal Public Defender.*

Mr. MANN. The subcommittee will now stand adjourned until 9:30 tomorrow morning.

[Whereupon, at 1:15 p.m., the hearing was adjourned, to reconvene at 9:30 a.m., Thursday, February 24, 1977.]

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

THURSDAY, FEBRUARY 24, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 2237, Rayburn House Office Building, Hon. James R. Mann [chairman of the subcommittee] presiding.

Present: Representatives Mann, Holtzman, Gudger, and Hyde.

Also present: Thomas W. Hutchison, counsel; Robert A. Lembo, assistant counsel; and Raymond V. Smietanka, associate counsel.

Mr. MANN. The subcommittee will come to order. The Subcommittee on Criminal Justice today resumes the study of the proposed amendments to the Federal Rules of Criminal Procedure that it began yesterday. Our witnesses include representatives of the Judicial Conference, a representative of the American Bar Association, Federal public defenders, and a practicing attorney.

As I indicated yesterday, the subcommittee faces a serious time deadline. Since the proposed amendments will take effect August 1, 1977, the subcommittee must act expeditiously if legislation is to be enacted before then. We appreciate the cooperation of the witnesses in meeting our deadline.

In recent years, rules changes proposed by the Supreme Court have encountered congressional opposition. The Congress has delayed the effective dates of the Federal Rules of Evidence, the April 1974 amendments to the Federal Rules of Criminal Procedure, and the habeas corpus rules, as well as the effective date of the proposed amendments to the Federal Rules of Criminal Procedure that are presently under consideration. In addition, Congress has actually amended some of the rules that have been proposed.

All of this suggests to me that the subcommittee ought to look at the enabling acts and review the rulemaking and amending process. I am aware that other members of the subcommittee are interested in this subject, and I understand that the Chief Justice is likewise concerned about it. I am hopeful that the subcommittee will be able to look into the matter in the not-too-distant future.

Our first witnesses today are Judge Roger Robb and Prof. Wayne LaFare, who will testify on behalf of the Judicial Conference of the United States.

Gentlemen, come forward to the table. Judge Robb was appointed to the U.S. Court of Appeals for the District of Columbia Circuit in 1969 and has served there with distinction. He is a member of the Advisory Committee on Criminal Rules, the body responsible for the initial drafting of the proposed amendments. We are pleased to have you here today, Judge Robb.

Wayne LaFave is professor of law at the University of Illinois and has appeared before our subcommittee on prior occasions. He serves as the reporter to the Advisory Committee on Criminal Rules, and it is a privilege to welcome him here again.

We have received copies of the written statement prepared by Professor LaFave and, without objection, it will be made a part of the record.

Mr. MANN. Gentlemen, you may proceed as you wish.

TESTIMONY OF JUDGE ROGER ROBB, U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND PROF. WAYNE LAFAVE, UNIVERSITY OF ILLINOIS COLLEGE OF LAW

Judge Robb. Thank you, gentlemen.

Mr. LaFave has a statement to make to the committee.

Professor LAFAVE. Mr. Chairman, with your permission, what I would like to do is to make a brief statement with respect to each of the rules before the committee and perhaps stop after each one so that both of us could respond to questions with respect to that rule and then move on to the others, as they are all separate matters.

Judge Robb and I appreciate very much being able to appear on behalf of the Judicial Conference to present our views with respect to the proposed rules. As you know, the Advisory Committee notes accompanying the rules go into some detail as to the reasons behind them. I do not plan to go into all of that here, but will try to summarize the major considerations that led to their adoption.

I would like to do one thing before I get into the rules themselves, if I might, because of a comment that I noted in one of the prepared statements. I would like to point out the process by which the rules got here. The rules were prepared by the Advisory Committee on Criminal Rules late in 1972. They were approved for distribution to the bench and bar by the Standing Committee on Rules of Practice and Procedure in early 1973. Thereafter, a total of 5,000 copies of that preliminary draft were printed and circulated.

In addition thereto, this preliminary draft was reprinted in the Federal Supplement and Federal Reporter and Supreme Court Reporter advance sheets for June of 1973 and thus reached, I think, virtually every lawyer in the country having some interest in Federal criminal practice.

In each instance, the Reporters on their cover drew attention to the fact that the proposed rules were inside and there was a letter from the Judicial Conference requesting responses not later than February 1, 1974. So the bench and bar were given more than 6 months to respond to the preliminary draft. We did receive a good number of responses, which led in many instances to revisions in the preliminary draft, so that the rules you now have before you in many respects are

different and perhaps better than what was originally circulated. The rest of the history I believe you know.

Mr. MANN. You have been involved in this process with the Advisory Committee since 1973. Did you serve on the Advisory Committee when other rules were promulgated?

Professor LaFAVE. Prior to that date?

Mr. MANN. Yes.

Professor LaFAVE. No.

Mr. MANN. Do you know whether the Supreme Court ever makes any changes in the proposed rules that the Judicial Conference forwards to it?

Professor LaFAVE. Yes, it has happened. I do not know of any recent examples, but I know that it has happened on rare occasions.

Mr. MANN. How about the Judicial Conference itself making changes in the Advisory Committee's recommendations? The Advisory Committee recommendations go to the standing committee?

Professor LaFAVE. Yes, the process is that the Advisory Committee puts together a preliminary draft and then it is sent to the standing committee for permission to circulate. They do not study the draft in great detail at that point. It is then circulated to the bench and bar and then we receive the comments and then the Advisory Committee goes through it again and revises. It then goes to the standing committee and the standing committee has on occasions made significant changes in what the Advisory Committee has proposed.

The rules previously before this committee dealing with rule 4 and the use of alternatives to the arrest warrant are an example. Some of those provisions, I think the ones that ultimately were dropped out of the rule, were proposed not by the Advisory Committee, but were added by the standing committee.

Judge ROBB. I might add, Mr. Chairman, that certainly in recent times frequently a member of the standing committee, one or more members of the standing committee, will attend the meetings of the Advisory Committee. For instance, the last meeting we had, as I recall, Mr. Bell, a member of the standing committee, was there and also Judge Thompson from Baltimore. So we have a rather close liaison between the two committees.

Mr. MANN. Thank you very much.

Professor LaFAVE. The example I was trying to come up with a minute ago now comes to me and it is rule 48 dealing with dismissal. It says: "The attorney or the U.S. attorney may by leave of court file a dismissal." I recall a question arising as to where that "by leave of court" language came from. History indicated it was not in the rule as it was forwarded by the Judicial Conference, but that it had been added by the Supreme Court. So it does happen on occasion. I think the occasions are rare.

If I may then turn to rule 6 dealing with the grand jury, there are two amendments. One, I think, is fairly routine and noncontroversial. It appears on lines 25 through 29. It substitutes the phrase "Federal magistrate" for court, indicating who may order that the indictment be kept secret. This simply corresponds to a change in the subdivision of that rule which has already been adopted by the Congress. Likewise, the phrase "given bail" has been changed to "released pending trial" so that it conforms to the Bail Reform Act.

The significance of rule 6(e) is that it elaborates the existing provision concerning disclosure of matters occurring before the grand jury to attorneys for the Government. It adds a sentence which says: "For purposes of this subdivision attorneys for the Government include such other Government personnel as are necessary to assist the attorneys for the Government in the performance of their duties."

The purpose of this added sentence is to make it clear that rule 6(e) does not forbid U.S. attorneys from making use of this expertise from other Government employees when that outside expertise is, in fact, necessary for the U.S. attorney to carry out his duties. Experience has shown that often the U.S. attorney does need some kind of expert assistance, whether it is an FBI agent to simply check out a statement, or perhaps IRS or SEC personnel to examine the books and records that have been subpoenaed or to make evaluation of handwriting exemplars or something like that.

So the problem does arise with some frequency and the longstanding practice has been for the U.S. attorney to make use of these personnel. The new sentence tends to legitimate the longstanding practice by recognizing and making clear that it does not conflict with the rule. The Advisory Committee note says that the case load on this point is somewhat limited. Since those words were written there have been a number of other cases decided. They have rather consistently concluded that the practice is permissible.

I think the one thing that needs to be stressed about this particular change is that it only contemplates the U.S. attorney using these other Government personnel when it is necessary for the U.S. attorney's work. What it does not contemplate at all is the turning over of this information to the other Government agencies themselves. The circumstances in which that can happen are dealt with in another part of rule 6(e) which is not changed at all; namely, the part that says that a court can direct disclosure only preliminary to or in connection with a judicial proceeding.

There is a good bit of case law that has developed as to the meaning of that part of 6(e) and, generally, the cases say that the grand jury material cannot be turned over to an administrative agency for purely administrative proceedings, because that is not a judicial proceeding. But there are occasions when an administrative agency can show sufficient need with respect to pending judicial proceedings.

The point is that no change is being made in that part of the rule, so the barriers to administrative agencies getting their hands on this material still exist. I think that is all we need to say preliminarily about rule 6 and we would be glad to respond to any question with respect to that rule.

Mr. MANN. Does anyone have any questions?

Mr. HYDE. Professor, as I understand your testimony, it is that assurances that information divulged before the grand jury for which the U.S. attorney wants help from, say, the SEC or the IRS in interpreting, will be immunized from access by the administrative agencies because of case law.

Professor LAFAYE. That is correct.

Mr. HYDE. Don't you think it would be well if it were specified in the full now that we are broadening access to this information or the availability of this information to assistants of the U.S. attorney, to specify

in the rule that it is for a very limited purpose, namely, the exclusive purposes for which the grand jury is impaneled, rather than leaving it to the—having to search out the case law?

Professor LAFAYE. Mr. Hyde, I guess I would agree that that point ought to be made clear. My own personal feeling is that it is clear in the present draft because it specifically states that it must be necessary to assist the attorneys for the Government in the performance of their duties.

Mr. HYDE. The Government attorney's duties are rather broadly based, are they not?

We are talking about their duties with reference to the particular matter under investigation now.

Professor LAFAYE. Yes, but Government attorney's, the U.S. attorney's business or duties, does not extend to the matters before other agencies or administrative agencies. That is why I think what is contemplated will happen here, taking your example, is that an expert from the SEC, who perhaps can understand and interpret certain corporate documents, will be allowed to examine the documents and and then relate to the U.S. attorney what their significance is.

What he can't do is cart the documents off to the SEC and then say, "Why don't we make use of these documents for some proceeding of our own against these people?"

Mr. HYDE. I have an open mind on this but the limitation is in the broadening of the definition of attorneys for Government. It includes those enumerated in 54(c) and such other personnel as are necessary to assist the attorneys for the Government in the performance of their duties. That is defining them but doesn't restrict what they are going to do with the information once they have learned it. Once this IRS fellow has sat there and learned that the president of the ABC Co. is not reporting all of the income, he then tiptoes back to the IRS and how does he expunge that from his mind? What penalties would exist if he were to use that information?

I guess what I am saying is, would it harm the verbiage of the rule to specify that there is a limit on the use of the information divulged by these other governmental personnel.

Professor LAFAYE. Judge Robb, do you see any difficulties with that?

It seems to me that is the intention behind the proposed change.

Judge ROBB. Off the top of my head, it would seem to me, Mr. Hyde, that if some agency improperly received and used information derived from this source that you might have a situation analogous to a wiretap that was unlawful and the court could take care of that in due course. In other words, you would treat it just as though it was information received through an unlawful wiretap or an invalid search and seizure.

Mr. HYDE. I appreciate that if the source of the information is ever known. It could be done inadvertently. It could be not necessarily malicious or anything. An IRS agent is an IRS agent.

Judge ROBB. But I think, perhaps, the practical value of this change is a little bit narrower than what we are talking about. I was a prosecutor more than 40 years ago. I frequently had to talk to an FBI agent about what somebody had testified to before the grand jury. Strictly that probably wouldn't be permitted under the rule

without amendment and that doesn't make sense to me, because you want to ask your FBI agent to go out and find out if the man is telling the truth. You can't do it until you tell him what the man said. So, I think that would be the most frequent use of this rule.

Mr. HYDE. I have no further questions.

Mr. MANN. Mr. Gudger?

Mr. GUDGER. I wanted to ask the Professor one question that is very limited in scope. The word "court" appears in the first paragraph of your comment on rule 6 and I think the word "court" that is supposed to be amended to read Federal magistrate is only with respect to the answer in the last sentence of subsection (e) of rule 6.

I notice that just prior to that sentence and in the body of subsection (e) there are provisions that only when so directed by the court preliminary to or in connection with judicial proceedings and upon a showing that grounds may exist that the court may direct. That court would still be the district court.

Professor LAFAYE. That is correct.

Mr. GUDGER. And the only change would be the rule of secrecy which the magistrate could now impose at the bond hearing, so to speak.

Professor LAFAYE. That is correct. The change of court to Federal magistrate with respect to ordering secrecy until the defendant is in custody is necessary because of the change that has already been adopted in the rule that permits a return to the Federal magistrate. That change is made because sometimes the grand jury has acted, they have an indictment before them, but the district judge may be in some other locality hearing a case. The committee could see no reason why the return couldn't be made to the magistrate. Since the secrecy order would be made at the time of the return, a comparable change is made there. But no change is being made, as you correctly point out, to the other provisions which provide that only a district court can order the revealing generally of grand jury material.

Mr. GUDGER. I wonder if I might ask one other question of Judge Robb having to do with the other aspect of this rule 6 change.

Mr. MANN. Yes.

Mr. GUDGER. That results to the disclosure by attorneys for the Government. Do I understand correctly that this is the practice now, that Government attorneys have been disclosing this information and wherever there has been any question through judicial interpretation this has been held proper?

Judge ROBB. I can't speak authoritatively as to the practice now because I haven't been a prosecutor for more than 40 years. But I would assume that where an assistant U.S. attorney wanted to talk to an FBI agent to verify something someone had testified to before the grand jury, he would go ahead and do it.

Mr. GUDGER. I will refer, if I may, to the notes on Mr. LaFave's statement, page 4, where he said it is important to note that the proposed new sentence fairly states an existing practice, which has been consistently upheld by the courts.

Judge ROBB. I wouldn't challenge that, no, sir.

Mr. GUDGER. I take it, you do not challenge that so far as practice. No, sir.

Judge, having been a prosecutor yourself—and I have had the same privilege in State courts—why isn't it adequate before the Federal district attorney sends the witness to the grand jury he has already interviewed him. He has taken his statement and he knows what his testimony is going to be or he should.

Certainly by the time he is at grand jury posture, he usually has gotten his supporting information from his experts based on the statements which he has received from the initial investigation. Is there any reason why this has not been adequate up to now? Aren't we doing something that is not truly necessary under the practice because we have gotten around it in many districts?

Judge ROBB. Of course, the careful prosecutor has interviewed his witnesses before he puts them before the grand jury, but oftentimes matters come out before the grand jury that have not come out before, especially when the man is under oath before the grand jury. He may testify a little differently than he did before. So, I can't say that a mere interview beforehand is enough to cut off all post-testimony investigation or scrutiny of the man's testimony.

Mr. GUDGER. One final question, Mr. Chairman.

Here again, Judge Robb. I think you have already answered it in response to a previous question. You interpret that the cloak of secrecy binds this person to whom the district attorney has revealed this information and that the information is subject to protection thereafter. In other words, it cannot be used by this expert who has been consulted on the basis of the grand jury transcript. It cannot be used by him in any other proceedings?

Judge ROBB. I would think so, yes, sir. That would be my opinion.

Mr. GUDGER. But the rule does not write that in.

Judge ROBB. No, sir.

Mr. GUDGER. The amendment does not make that provision.

Judge ROBB. No, sir.

Mr. GUDGER. Thank you, sir.

Professor LAFAYE. Not specifically. It states that the disclosure must be to assist the attorney for the Government. Our assumption was that that was the limited purpose for which the expert could use it. But perhaps the language could be more clear. If I could just add one comment to your earlier question about whether the U.S. attorney could solve all of this by calling in the expert in advance; I suspect the problem does not arise frequently with respect to testimony, where I suspect it is often true that the U.S. attorney has a pretty good idea in a general sense of what the testimony is going to be. It arises as to physical evidence, such as books or records of a corporation that need expert attention from an accountant or someone with other special skills.

Mr. MANN. Ms. Holtzman?

Ms. HOLTZMAN. Thank you very much, Mr. Chairman.

I just wanted to clarify something that I think may be an unintended problem with this rule. It is that the definition under the proposed rule of attorneys for the Government may suggest that under sub (d) the personnel who assist attorneys for the Government, IRS and SEC agents and the like, may be permitted to have the information. I don't believe that was the intention.

Professor LAFAYE. That was not the intention and I don't believe that would be a fair interpretation of the added language because it says for the purpose of this subdivision, which is subdivision (c) only.

I don't think there is anything in the new language that in any way could be read as enlarging the group of people who may be physically present in the grand jury room.

Ms. HOLTZMAN. I am glad to get assurance on the record that that was not the intention. We had testimony yesterday to the effect that one of the safeguards in requiring U.S. attorneys to make an application to the court prior to the use of outside personnel to help in the analysis of this material was that the court could establish rules and regulations to proscribe the improper dissemination of materials from the grand jury. In other words, by applying to the court, the court would insure that there were, for example, requirements of sequestration of grand jury materials to be kept in a separate place, that there would be records kept as to who had access to the grand jury materials and that there might in some cases be oaths of secrecy obtained from personnel, and that by having in this rule, proposed subdivision (c), the routine availability of these people, how do you protect the secrecy of the grand jury? How do you allow the court to impose restrictions that will preserve and protect the secrecy of the grand jury? Aren't you better off in having either an application to the court or in having certain restrictions spelled out as to what these other personnel can do with the material and how it must be handled?

Professor LAFAYE. This would be another way of operating the system, I suppose.

It would be, I think, a little more cumbersome and a little more complicated. If there were reason to believe that under present practice there was abuse, I guess I would favor the more complicated process; but I am not sure that there has been any problem.

Ms. HOLTZMAN. Is an IRS agent who is given access to this grand jury material bound to secrecy? Is there anything binding him to secrecy?

Professor LAFAYE. I don't know.

Judge ROBB. I am sorry; I couldn't hear the last part of the question, Congresswoman.

Ms. HOLTZMAN. I am sorry.

If an IRS agent looks at grand jury materials at the request of the U.S. Attorney, is that IRS agent bound to secrecy? Is there any rule or provision that binds that agent to secrecy?

Professor LAFAYE. I would assume, looking back at rule 6(c), that he is bound by rule 6(c).

One of the problems is that as far as I know, there is no Federal criminal statute that imposes any sanctions for this. One of the matters that our committee has discussed with respect to some other grand jury problems is the need for such a provision.

The next sentence in rule 6(e) says otherwise a juror or attorney or interpreters and so forth may disclose matters appearing before the grand jury only when so directed by the court—the contempt power has been used where that rule has been violated and I would assume it could be used against the IRS agent, just as well as anybody else.

Judge ROBB. I might say that the contempt route has proven quite unsatisfactory. As you will probably recall, we have had several in-

stances recently where there have been massive leaks of testimony before the District of Columbia grand jury. Although the district court asked the Department of Justice to investigate, nothing ever came of it.

As Mr. LaFave pointed out, there is no criminal statute penalizing wrongful disclosure of matters before the grand jury. The existing rule specifically provides that no obligation of secrecy may be imposed upon any witness. So you have a problem there.

Ms. HOLTZMAN. I am aware the court has contempt power to punish instances where it believes the rules have been violated.

Really my question goes to whether or not this person would be covered in the first place from disclosing this material to other people in the Internal Revenue Service.

For example, the provision really with respect to secrecy is the first sentence of rule 6(e) which says that disclosure of matters may be made to attorneys for the Government in the performance of their duties. Otherwise they can't disclose.

What are an IRS agent's duties?

Are his duties solely in connection with the grand jury? Does anything spell that out? Or can he in the performance of his duties disclose instances that come to his attention as to misuse to the tax laws?

If he discloses that to his superior in the Internal Revenue Service, would he be in any way violating rule 6(e)? That is a question that I have and that is why—

Professor LaFAVE. I can see your problem and it is a legitimate concern. I would say that maybe the language ought to be changed to make this clearer than it is. I started reading it at about line 8 or line 9. My interpretation of that language is that these other Government personnel may receive this information only to the extent necessary to assist the attorneys for the Government in the performance of their duties. So the question is not what are all the duties of an IRS agent but the question is what are the duties of the attorney for the Government. These other experts may use the information only for that purpose.

Let's say one IRS agent is called over by the U.S. attorney, or perhaps he is an accountant, and he says, "Look, can you tell me what this corporate account means?"

I take it he cannot go back to the IRS and report to his superiors, "Boy, you ought to know what such and such corporation is doing, because I have just found out."

That is not contemplated by the change.

Ms. HOLTZMAN. I understand it is not contemplated, but the rule as drafted may not really protect grand jury secrecy.

Thank you, Mr. Chairman.

Mr. MANN. Then I get the impression that it is your thought that the district attorney, the attorney for the Government, will not be required to consult the court in order to determine what Government personnel are necessary to assist him in his duties.

Professor LaFAVE. That is correct. The approach taken by the advisory committee was not to deal with this problem as are other disclosure problems discussed later in the rule, where you actually need an order of the court to disclose some other judicial proceeding.

I take it the assumption of the advisory committee was that the attorney for the Government was the best person to make the judgment as to the need in a particular case.

Mr. MANN. Getting back to this expert, let's assume that he is called before the grand jury to testify as an expert, perhaps on interpretive questions or questions based on facts that have previously been brought to the attention of the grand jury.

In that process he acquires facts about the case. He is a witness, but he is also the prosecuting attorney's expert.

I don't read in the otherwise clause anything to prevent a witness from disclosing matters learned by him before the grand jury.

Professor LAFAYE. That is correct.

Judge ROBB. The rule so states.

Professor LAFAYE. He is not treated any differently from any other witness as a result of that case with respect to what he learned by virtue of being a witness. I think that is different from what he may learn by otherwise assisting the U.S. attorney.

Mr. MANN. He could probably learn enough to go and talk to his agency about the problem.

Along that same line, the rule seems to restrict to other Government personnel the experts—and I will use that term loosely—that the attorney for the Government may call upon.

We have a pretty big Government with a lot of experts, but on certain matters there may not be a governmental employee who is expert in that field.

Is it your intention not to permit the prosecutor to call in an astrologer or astronomer, for example?

Professor LAFAYE. Yes; that is correct.

Apparently representatives of the Justice Department whom we talked to about this particular problem did not seem to think that was a problem, in other words, that there was an occasion when they would need an expert and couldn't find the astrologer some place in the Federal Government.

Apparently that is not the problem.

Mr. HYDE. There are several in the HEW.

Mr. MANN. I am sure that the trend is in the way of the Government providing all things.

Under the *Hawthorne and Simplot* cases,¹ there seems to be a trend toward permitting the disclosure of grand jury information under the first sentence of rule 6(e) only with the permission of the court and under strict guidelines.

Is there any reason to believe that the expert used by the prosecuting attorney won't advise his agency and that the agency won't then proceed under the second sentence of rule 6(e) to get what the expert might otherwise not be able to reveal?

Professor LAFAYE. I suppose that could happen, but I am not sure that the cases have really broadened the right of discovery quite as much as you have suggested under this latter provision.

The cases that I am familiar with generally have required a strong showing by the administrative agency of a need for the material, that

¹ *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1976); *J. R. Simplot Co. v. U.S. District Court for the District of Idaho*, Nos. 76-1893, 76-1895 (9th Cir., filed Nov. 12, 1976).

there is no way they could acquire comparable evidence that it is critical to their undertaking, and that is going to be used in connection with a judicial proceeding. If the administrative agency wants it for purely administrative purposes to use in an administrative hearing, this does not come within the rule.

So, the answer in that situation would be that they cannot obtain it at all.

Mr. MANN. Do you have a slight feeling that maybe rule 6(e) ought to be rewritten entirely?

Professor LAFAYE. We have been working on some grand jury matters and thus do have and have had under consideration the possibility of doing some other things with 6(e), but what will ever come of that I am not quite sure.

Just to suggest some of the things we talk about from time to time, there has been some discussion of including witnesses as among those who are bound to secrecy. There was the suggestion that there is a need for a criminal statute dealing with unauthorized grand jury disclosure, which relates to 6(e). So, it may be that there are some other things that need to be done to 6(e) and the advisory committee plans to give that some attention.

I still think that 6(e) in its present form deserves to be clarified to deal with this real problem of what the U.S. attorney can do when he has need for an expert.

Mr. MANN. Just one more question. I would like to be comfortable with the restrictive interpretations you put on the phrase "performance of their duties" in reference to the attorney for the Government.

As a prosecutor my duty is to enforce the law. There is nothing in the law that exempts me from being the prosecuting attorney in all these administrative prosecutions. The agency may provide its own experts, but the prosecutor still has substantial duties with reference to the prosecution of all criminal violations.

Isn't the phrase "performance of their duties" capable of a broad interpretation that would permit the prosecutor to take any information he gets through the grand jury and initiate prosecution in other areas?

Professor LAFAYE. Yes, I suppose it has always been true that if, in the course of a grand jury investigation, the U.S. attorney comes onto some information which does not directly relate to the matter that he started with, the matter that he was investigating, but shows some other criminal activity for which he has the responsibility of prosecuting, I think he could use that information for that purpose and that we would expect him to do so.

But I don't think that the first sentence of 6(e) contemplates or, as far as I know, has ever been interpreted to mean that the attorney for the Government can use the information to assist anybody else in the performance of their governmental duties. In other words, to the extent that administrative agencies and the U.S. attorneys may have somewhat overlapping responsibilities, I don't think it follows that the U.S. attorney can make disclosure to other people.

Mr. MANN. I find only a little comfort in that because even though the other agency does have primary responsibility, the prosecutor will find it mighty easy to overlap with the agency.

The rule 6(e) amendment is extending the disclosure provisions, and a liberal interpretation of what the prosecutor's duties are would make this provision little protection.

Mr. SMETANKA. I have one question and I think it has been partially answered before.

In interpreting who is necessary, the only person making that decision would be the U.S. attorney?

Professor LAFAYE. That is correct.

Mr. SMETANKA. And the defendant or whoever's records were subpoenaed by the grand jury has no recourse?

Professor LAFAYE. That is right. At least as a matter of course. I don't know whether there is any procedural device—if somebody whose records have been subpoenaed is aware of the fact that it is contemplated that the U.S. attorney is going to have an IRS agent examine them—whether procedurally there is anything we might do at that juncture. But at least the rule doesn't contemplate as a matter of routine that that would occur.

I believe that Judge Becker, a witness yesterday, has held some hearings initiated by the witness, so apparently it has happened on occasion. Even though it is not required and the witness says, "Wait a minute, I don't want these records disclosed," the court has inquired into that.

Mr. SMETANKA. In the *Hawthorne* case he expressed concern that this amendment might make this 6(e) orders under which he has been operating unnecessary. I take it you confirm that, that they would be unnecessary.

Professor LAFAYE. To the extent that the disclosure was going to be solely to a particular individual to assist the U.S. attorney, it would be unnecessary. I am not sure if I am thinking of the *Hawthorne* case or some others. I believe I am correct, though, in saying that in some instances the reason there has been the need for a 6(e) order is because there were two things going on at the same time.

No. 1, the U.S. attorney had the desire for an expert to aid him.

No. 2, an agency was trying to get their hands on the material at the same time.

So, I think sometimes the 6(e) order involved the matters considered in lines 13 and on down. No change is made with respect to that.

Mr. SMETANKA. Also you said the rule as it stands now prohibits disclosure basically outside of a judicial proceeding. A tax hearing would be considered a judicial proceeding, would it not?

Professor LAFAYE. Yes.

Mr. MANN. That raises an interesting situation.

Are you familiar with footnote 15 in the *Simplot* case opinion that says that rule 6(e) would still require a showing of need by the attorney for the Government?

Do you have that case handy?

Professor LAFAYE. Yes, I have it here.

Mr. MANN. It is at page 8 of the slip opinion.

Professor LAFAYE. All I can say is that that is not what we contemplated. I think it is a misreading of the rule and the notes.

Mr. MANN. Do you agree with the *Simplot* decision that rule 6(e) as amended would still require the attorney for the Government to show to the court a need to use an expert?

Professor LAFAYE. It is not clear to me that that is so because the authority that is cited in the footnote is *Coolidge v. New Hampshire*,¹ which seems pretty much a far cry from the present situation.

Judge ROBB. That is a search-and-seizure case.

Professor LAFAYE. It is one thing to say that the U.S. Attorney can decide when a person's home is going to be searched and quite another to say that he can decide when it is necessary to have assistance.

Judge ROBB. Of course, they could attack it, but how successful they would be I couldn't say at this point.

Mr. MANN. I tend to agree with this: "Because of the U.S. Attorney's involvement in the prosecution of the case he or she cannot be entrusted with passing on the necessity of assistance."

That may be a little too strong, but I do think there ought to be some way to attack increasing the number of persons who have access to that information.

I think we should include in the record the *Simplot* case opinion, which is only available at present in slip opinion form. It is a decision from the Court of Appeals for the 9th Circuit, case Nos. 76-1893 and 76-1995.

Without objection, that opinion is made a part of the record.

[See app. 1 at p. 249.]

Mr. MANN. All right.

Suppose we move on to rule 23.

Professor LAFAYE. All right.

Two amendments are also proposed to rule 23, trial by jury by the court. The first of these is to subdivision (b), which in its present form authorizes the parties, with the consent of the court, to stipulate in writing that the jury may consist of any number less than 12.

One way in which this rule might be carried out in practice is when, in the midst of a trial, for example, one juror becomes ill and the parties at that point agree to continue the trial to its conclusion. But it is the practice, at least in a number of district courts, to utilize the stipulation at an earlier point. Instead of waiting until the problem arises in the midst of the trial, the parties stipulate at the beginning, before the trial gets under way, that they are agreeable to proceeding with 11 or 10, or whatever number, should something arise that justifies the excusal of one or two jurors.

I think most judges that follow this practice have thought that it's authorized under rule 23(b) in its present form.

The practice of settling the matter outside of trial is a very useful one because, if the judge knows at that time that there is a stipulation, he can decide that it's unnecessary to spend time empaneling alternate jurors.

Some commentators have suggested that it is not entirely clear whether 23(b) does authorize this practice or whether, for example, if there was a stipulation in advance of the trial but then the occasion arose for excusing a juror, whether it would be necessary for the parties to once again reaffirm their prior stipulation. And, thus, this amendment to rule 23 is simply intended to clarify that the practice is a permissible one.

The other amendment has to do with the making of special findings under subdivision (c). It makes clear that the findings may be oral.

¹ 403 U.S. 443 (1971).

The Advisory Committee's view is that there is no reason why the findings may not be oral, because they will be a part of the record and will be available upon appellate review.

The other change to sub (c) sets a deadline for making a request for findings. The rule in its present form says nothing at all about when this request is to be made, and it is thought desirable, if there are going to be special findings, that the judge be given timely notice that that is what is expected of him, and this is what that particular amendment is intended to accomplish.

That, essentially, is what the changes to 23(b) are all about.

Mr. MANN. Are there any questions with reference to rule 23?

Mr. SMETANKA. In the amendment to rule 23 concerning the request for special findings, do you see any necessity that a request be made at all?

Is it possibly a better alternative that special findings be made in all cases?

Professor LAFAYE. I'm not quite sure what the advantage is. As I understand it, making special findings is one of several ways that may be available to get on the record some matters that would serve as the basis for appeal. It seems to me that to expect that to be done as a matter of routine in all cases, it would simply be to add an additional burden which in many instances would be unnecessary.

I see no reason why, if defense counsel sees the need for special findings, he can't ask for them if he wants them.

Mr. SMETANKA. Do you see any problem if it were required in all cases?

Mr. LAFAYE. We have speedy trial problems and everything else putting special burdens on the courts.

Judge Robb, do you see any need for doing it in all cases?

Judge ROBB. No, I don't. The district courts have enough to do without having to make special detailed findings in every criminal case that comes up.

In most cases, it is a question of veracity between the defendant and somebody else. The reasons for the court's verdict or finding of guilt are perfectly obvious. I think the district judges would feel that they had been handed just one more straw that broke the camel's back if they had to make findings in every case, although I must confess it wouldn't be very difficult to do in most cases.

Mr. MANN. Mr. Gudger?

Mr. GUDGER. I have just read what appears to be the proposed amendment, but I do not find anywhere that this rule 23(b) additional amendment, or proposed amendment, provides when this stipulation is to be entered. I would assume that the best and most appropriate time would be before the jury is empaneled.

Professor LAFAYE. Yes.

Mr. GUDGER. Otherwise, I would think we would be back to the stipulation as presently drawn in 23(b).

Professor LAFAYE. In practice, I think that is what is going to happen. I would suggest that there is nothing to be gained by particularizing that in the rule, because I can conceive of the possibility of somehow the trial having barely commenced, at which point the stipulation is then entered. I see no point in requiring that this stipulation must occur in advance of trial.

Mr. GUDGER. Mr. LaFave, the reason I brought the question out was this. Sometimes, once a case gets in the course of trial, there are pressures felt by the parties because some evidence is in. Expenses have been incurred. The trial judge is pressing for a disposition of it after a day or two has already been committed.

It occurs to me that, in the better practice, this waiver of constitutional right—there are those who contend that a 12-man jury is a constitutional right—should take place before empaneling.

What is your personal thought about it?

Professor LaFAVE. My personal thought is that, to the extent there are the kinds of pressures to which you refer, I suspect the pressures are greatest under the waiver situation which is presently in the rule; namely, the situation in which it is now apparent that a juror must be excused and there is no way the trial can continue unless the stipulation is entered. That is something that is possible under the present rule.

To the extent that the dynamics of the situation creates some pressure, it would seem to me the maximum pressure exists at that point and not when the question is simply shall we stipulate to something that may or may not happen in the future. What I am saying is that I don't see the situation that is added in lines 6 through 9 as a situation in which the pressures are any greater or likely as great as may exist in the situation that is already written into the rule.

Mr. GUDGER. May I have one more question, Mr. Chairman?

Mr. MANN. Surely.

Mr. GUDGER. Obviously, if a person is sick or has been unable to attend court on the third day of that trial but it is anticipated that maybe he can come in on the fourth day, but maybe he cannot, the defendant is going to withhold stipulation at that point, isn't he?

Professor LaFAVE. I'm not sure I understand the situation you are talking about.

Mr. GUDGER. What I am saying is, if you have reached deep into the course of trial and no valid verdict is going to be forthcoming unless a stipulation is granted by the defendant, is he going to stipulate?

Professor LaFAVE. I think that depends on how he senses the situation. If he and his counsel sense that they are ahead at this point and that they might be worse off on retrial, he might. I'm not sure he would. But the point is that that is not the case that comes under the new provision. That is the case that is in rule 23(b) now; namely, where the problem has already arisen and a juror must be excused, and the question is, shall there now be a stipulation? The new procedure is that the stipulation is made prior to the occasion where there is a need to excuse a juror.

What I was suggesting was that I would think the pressures to cave in are less in that situation than they are in the other situation, because all that is lost is the necessity to empanel alternate jurors that you might otherwise not have empaneled, while the loss in the other case is the necessity for another trial.

Mr. GUDGER. One further question, Mr. Chairman.

I have had the experience repeatedly—I guess 25 or 30 times in my experience—of a juror having to be excused for illness. One time I tried a case, a particularly unpleasant incest case, where three jurors failed to appear on the third day of the trial.

What I am getting at is this: Do you think it would defeat the purpose of the amendment in any way to suggest language that would say that before the jury is empaneled, and then provide for it?

Professor LAFAYE. Only in the sense that it wouldn't reach the case I mentioned earlier of an inadvertent failure to enter into the stipulation. If the trial has barely started and everybody is in agreement that they ought to do this, but for example, they didn't put it in writing until that point, I don't see any point in saying that it can't be done.

I guess I would be hard-pressed to explain to somebody if the rule were written in that fashion why it is that you can stipulate at any time during the trial when the problem is upon you, but you can't stipulate except before trial when the problem is not yet upon you. I would be hard-pressed to come up with some reasoning to explain that difference.

Mr. GUDGER. No further questions.

Mr. MANN. My concern is that the type of pressure that would develop is the judicial pressure prior to trial. The judge is not going to want to start that case—it is going to be pretty important to him and his attitude toward the lawyers in the case that they stipulate so that the course of the trial won't be cut short by jury problems. But counsel might not feel it advantageous to stipulate at that time. I can see it developing as a matter of course, as a matter of lack of cooperation if they don't do it.

Professor LAFAYE. I would have to give the same answer I gave before. And that is, to the extent that counsel would perceive this pressure, I would think the pressure is less under the new situation. If a judge is thinking to himself, "I sure hope they will stipulate," what he is saying is, "I hope they stipulate so I don't have to spend the time empaneling an alternate or a couple of alternates." That is one thing.

It seems to me it is another thing where the trial has been going on for 6 days, and a juror has now dropped dead, and the question is raised, "Shall we have a stipulation?" Now the stakes are much higher. So I would say again that I think the pressure is less under the new procedure than it is under the existing procedure.

Mr. MANN. I consider it a rather substantial right for a defendant, for example, to have that decision to make when the 12 are going to reach a final verdict. That is just a problem I perceive with it.

I am a little confused by the punctuation of the rule as amended, but there is no question that we are not giving the judge any discretion to proceed without a stipulation.

Professor LAFAYE. That is correct. It requires both parties in writing to approve it, and the approval of the court. All of that is needed.

I might add that it does not then permit the judge, once he has got the stipulation in his pocket, to simply excuse jurors for any reason. It applies only when there is just cause for an excusal.

Mr. MANN. Are there any other questions?

Mr. GUDGER. One other question, Mr. Chairman.

I would point out that the trial judge before the empanelment of the jury has the option of selecting a second or even a third alternate. But with a stipulation, such as we have suggested, before the jury is empaneled, then he would not have to pursue that course, provided counsel had agreed and the defendant had agreed to a return of a jury of 11 or even 10, although the trial judge presumably would not usually go to a situation of nine.

Professor LAFAYE. That is correct.

Mr. MANN. Thank you very much.

May we move on?

Professor LAFAYE. Next is rule 24 dealing with peremptory challenges, which is a controversial subject. As you know, the rule presently provides 20 on each side in death penalty cases, 6 for the government and 10 for the defendants in a felony case—

Mr. MANN. We went into this pretty thoroughly yesterday, and we are familiar with it. If you will, please discuss your basic rationale for the amendment.

Professor LAFAYE. I think basically there are three considerations that led to the adoption of the rule. Number one is that some saving of time and some saving of cost in the operation of the jury system will result from the reduction of peremptories. Obviously, that standing alone is not a sufficient reason. The judgment of the advisory committee was that in balancing that interest and the other interests that I will mention against the legitimate purpose of peremptory challenges, which is to assure that each party has an impartial jury, reduction to the numbers suggested would be appropriate.

Some States have that number or even a lesser number. As is so often true when dealing with numbers, I guess there is no way I can prove statistically that the lesser numbers are correct, any more than any one can prove that the present numbers are correct. All I can say is that the collective experience of the advisory committee and the standing committee led to the conclusion that these numbers, 12, 5 and 2, would usually suffice to serve the legitimate purposes of the peremptory challenge.

The basic point I want to make is that the rule in its present form and the rule as changed come at the problem from a slightly different point of view, and that is why I used the word "usually" a moment ago. The present rule has been interpreted to mean that in a single defendant case the judge does not have any authority to grant more peremptories than the rule provides. An important addition to the rule, the proposed amendment, is that the judge would have the power to give additional peremptories above and beyond that stated in the rule upon a showing of good cause.

So in terms of the difference in approach, the present rule sets the highest number of peremptory challenges that might be needed under the most compelling circumstances with the unfortunate result that the same number of challenges are available in every case, while the best characterization of the amendment is that it provides the number of challenges which we believe are sufficient in the great majority of cases, but then there is an opportunity for additional challenges where there are special circumstances, such as extreme publicity or something like that.

Just to mention the other two considerations that were at play here: A second consideration was that to some extent the reduction in the number of peremptories advances the cross-sectional policy expressed by Congress in the jury election service act. The Supreme Court indicated in *Swain v. Alabama*¹ that peremptories can be used for purposes that are normally thought irrelevant, and you can exclude people on the basis of race and religion.

¹ 380 U.S. 202 (1965).

The third reason I would point out is that ordinarily the number of peremptories available ought to be the same on both sides.

Under the present rule, this principle of equality is adopted in two out of three situations.

It provides for equality in the death penalty case and equality in the misdemeanor case, but not in the felony case. We can see no basis for that disparity, so we propose that both sides have the same number. This is the prevailing system at the State level and, of course, is the approach that the Congress last took when it dealt with this particular issue in enacting the District of Columbia Court Reorganization Act.

Mr. MANN. Thank you very much.

Any questions?

Ms. HOLTZMAN. No questions.

Mr. MANN. Mr. Hyde?

Mr. HYDE. No questions.

Mr. MANN. We went into this so thoroughly yesterday that I guess we just don't want to repeat our questions.

Somewhat by way of half-comment and half-question about the cross-sectional policy to which you refer in the Jury Selection and Service Act of 1968, I am sure there would be unanimous agreement that the jury panel should be selected at random from a cross-section of the community.

But when it comes to the selection of the trial jury, does that cross-sectional idea somewhat encroach upon a defendant's right to trial by an impartial jury? A defendant can strike, as the court says in *Swain v. Alabama*, somebody with blue eyes, or of a different color, or of a certain age or sex.

According to Mr. Jay Schulman yesterday, his statistics indicated that the Government is more guilty of striking on the basis of age, race or sex than the defendants are.

He has the perception that young people or black people are not as conviction-conscious as other groups.

Professor LAFAYE. Did he suggest that defense counsel were not doing the precise opposite or did he speak to that?

Mr. MANN. He related the whole problem of the pro-anticonviction attitude of jurors these days.

In any event, it disturbs me philosophically that we have to react to this extent with reference to a trial jury.

Professor LAFAYE. All I can say in response to that, Mr. Chairman, is that certainly I would not propose cross-sectionality with a vengeance, whereby we abolish peremptory challenges. I think the matter is one of striking a fair balance between several objectives, and it seems to me one legitimate objective is the cross-section objective.

Another objective is that there should be some opportunity for the parties to exclude jurors they think are biased even if they cannot establish their bias. What we are trying to do is fairly accommodate those two interests and the other interests involved.

Mr. MANN. Does anyone else have any questions?

All right, you may tell us briefly what the next rule does, and then stop there.

Rule 40.1. We haven't had any testimony about it up to this point.

Professor LAFAYE. Basically, the rule does three things. No. 1, in subdivision (a) it requires that the removal petition be filed not later than 10 days after arraignment in the State court with the proviso that for good cause shown it can be filed later. That is a change from existing law that says that the petition can be filed at any time before the State trial commences.

The second change appears in subdivision (b) and it requires that all existing grounds be stated in one petition for removal. A second petition can then be filed only for grounds not previously existing or as otherwise permitted upon a showing of good cause.

The third aspect of new rule 40.1 is that the mere filing of a petition does not prevent the State court from proceeding further, except that a judgment of conviction cannot be entered. That would be a change from existing law, because under existing law, as soon as the petition is filed and the State authorities receive notification of that, the State proceedings must stop immediately at that point.

Basically, the effort here is to respond to what has been a very serious problem, at least in many parts of the country. It has popped up in certain localities. I recall some members of the advisory committee said they never had this problem and some other judges said they had been deluged with removal petitions.

The problem is that since you can go in on the eve of trial and file a petition, it is a very easy device for stalling the State court proceedings.

Mr. MANN. It is devastating. You can prepare an elaborate State case of some sort and Monday morning when you are ready to go to trial, you face a Federal removal petition.

If the subcommittee will excuse me, my concern at the moment is "10 days after arraignment." First, we have to worry about the definition of arraignment, which is different around the country. Ten days is not much time in which to reach a decision and prepare the necessary documents, especially when it is typical for it to be several months before the case comes up.

I don't know what we can put in, in its place. We can put a certain time before trial, but date of trial is not always that certain either.

What difference would it make if we made it 30 days?

Professor LAFAYE. It seems to me you need a time that gives you some chance of resolving the matter without delaying the trial. How best we express that, I don't know. There may be a problem with the term "arraignment." Apparently someone raised that question yesterday.

I understand that in some States the word "arraignment" may be used for different purposes.

Some States have more than one arraignment. There will be an arraignment on the warrant, which is really the first appearance before a judicial officer, and there is another arraignment later. I don't know if there is any word that captures better than the word arraignment the kind of situation we are talking about. Perhaps something in the history indicating that we are talking about the point at which the plea is entered, would be useful.

When I hear the word "arraignment," that is what I think is usually intended.

Mr. MANN. Ms. Holtzman?

Ms. HOLTZMAN. I have a number of questions about this rule, not the least of which is the propriety of changing a statute by rule; indeed, I question the constitutionality of that.

Professor LAFAYE. The Enabling Act contemplates that happening, because it says that if there is any statute inconsistent with the rule adopted by the Congress, the rule shall prevail over the statute.

I am not quite sure what the constitutional issue is.

Ms. HOLTZMAN. I am not sure whether the Congress can delegate to an advisory committee the power to change statutory language.

In addition, I have grave questions as to whether, in fact, the Rules Enabling Act allows for such changes.

In the third place, even if it were both constitutional and permissible from a statutory point of view for the Supreme Court to do what it has done, I question the wisdom of proceeding in this respect.

Let me go to the issue of what prompted this rule change.

Did the advisory committee do any analysis of the removal petitions that have been filed, the numbers which were objective, the numbers which were frivolous? Did the advisory committee conduct a study?

Professor LAFAYE. In terms of a statistical, empirical research, the answer is no, we did not. We relied primarily upon the experience of members of the committee.

Ms. HOLTZMAN. The removal statute perhaps is not the most beautifully drafted statute, but it concerns something of extreme importance; namely, persons who are being prosecuted in a circumstance where they cannot vindicate their civil rights.

It seems to me that the purpose of the removal statute is to provide a Federal court forum to those who could not in State court vindicate certain civil rights.

Wouldn't we be well advised, if we are going to radically amend the rule to protect the people in such circumstances, to have done so after analysis of the actual number of petitions filed, granted and rejected, rather than the experience of a few persons.

Professor LAFAYE. It is very difficult to respond to that. I suppose one could make that objection to anything, "Couldn't you do more?" And I would say yes, it would be possible, I suppose, to do an empirical study to support that, and we did not do that.

Ms. HOLTZMAN. Especially since the removal statute seems to reflect a serious and legitimate concern, about providing a Federal forum in certain cases where rights were jeopardized.

It would seem to me that it would have been wise to have proposed a change only if there were serious and well-documented evidence that there was need for such a change.

Mr. MANN. Mr. Gudger?

Mr. GUDGER. Have there been any significant number of cases interpreting the existing statute, 28 U.S.C. 1443?

Professor LAFAYE. There have been very significant cases decided by the United States Supreme Court and to which reference is made in my prepared statement.

They are significant because they point out how limited the opportunities for removal under this particular section are.

The teaching of these cases, *Greenwood v. Peacock*,¹ for example,

¹ 384 U.S. 808 (1966).

is that you cannot obtain removal simply because your civil rights have been denied, because the charges are false, or because the defendant will be unable to obtain a fair trial.

The removal is permitted only when the prosecution is for conduct which is a federally protected right.

In the *Georgia v. Rachel* case,¹ the prosecution was for trespass. The court has said it is only that kind of situation that is covered by the statute.

Mr. GUDGER. So we are dealing with a very narrow area, are we not?

The fact that there may be a racial problem involved by way of defense is to be protected in the State courts and not by the intervention of removal proceeding under this statute.

Professor LAFAYE. That is correct.

Mr. GUDGER. Isn't that a substantially correct statement of the law?

Professor LAFAYE. The problem as it was related to us by those judges who said they were being deluged by removal petitions was that the chances of a case really fitting the *Georgia v. Rachel* definition are very slight, given that is the narrow way in which the Supreme Court has interpreted the statute.

The chances of a case arising that fits that description are few. The difficulty is that it is not too hard to put together a petition that appears to present that kind of problem, and therefore there has been a need for hearings and, of course, the matter can be appealed if there is a remand to the State court. There has been very substantial abuse of the removal process in some parts of the country.

Mr. GUDGER. Does the new rule contemplate that you must exercise the right within 10 days of arraignment, State court arraignment, just as you would have to assert a right ordinarily within 10 days of Federal court arraignment if you were striking at any of your criminal pretrial motions in the Federal court?

Professor LAFAYE. That is correct.

As I indicated in the statement I submitted, we think that the requirement that ordinarily—and there is the good cause exception—the requirement that ordinarily this be done not later than 10 days after arraignment is sound. It is another expression of the general policy that appears in Federal Rule 12, as amended just recently by the Congress, and is consistent with the better State procedure that has developed in recent years of having matters that can be determined in advance of trial fairly raised in advance of trial in order to get them determined so the trial is not delayed.

Mr. GUDGER. I have no further questions.

Mr. MANN. All right.

We can move on.

Professor LAFAYE. The final matter we would like to bring before the subcommittee is rule 41, subdivision c, which would authorize what is commonly referred to as the telephonic search warrant.

To describe the process very briefly, the applicant may be only a Federal law enforcement officer or an attorney for the Government.

The magistrate must be a Federal magistrate.

Mr. MANN. We went into this rather thoroughly, and I will call for questions.

¹ 384 U.S. 780 (1966).

Ms. Holtzman?

Ms. HOLTZMAN. I have no questions, Mr. Chairman.

Mr. MANN. Mr. Gudger?

Mr. GUDGER. No questions.

Mr. MANN. As I say, we had a pretty thorough discussion of it yesterday. I understand the rationale of it and the convenience of it.

Our concern was about the various mechanics of it and perjury problems with reference to it.

Mr. Smietanka, do you have any questions?

Mr. SMIETANKA. No questions.

Mr. ROBB. Mr. Chairman, might I add a footnote to the discussion of this rule?

Mr. MANN. You certainly may.

Judge ROBB. The advisory committee's note cites the case of *United States v. Johnson*, decided by our circuit on June 16, 1975. That was a panel opinion. It was subsequently overruled by the court en banc.

The case is quite pertinent to this subject. The facts were that the police received a tip sometime after 1 o'clock in the morning that if they looked through an uncurtained lighted basement window in a house in northwest Washington, they would see a group of men packaging and cutting narcotics.

They went and looked and, sure enough, there were the men. They called the assistant U.S. attorney to see about getting a search warrant. He told them it would take at least 1½ or 2 hours to get the warrant.

Of course, by that time, the narcotics and the men would have been gone. Therefore, they went in and made the arrests and recovered about \$85,000 worth of narcotics and got four or five defendants.

At the trial, the narcotics were introduced. It was contended that the police should have got a search warrant. Our court en banc held, with one dissent, that they were justified in entering without a warrant. But the court suggested very strongly and the court was of the opinion that this telephonic warrant application system ought to be instituted.

That case is *United States v. Johnson*, No. 73-2221.

I have a copy of this opinion here if the committee would like to have it.

Mr. MANN. Yes, sir.

Thank you very much.

The reason for the disappearance of members here is that we have 8 minutes left to get to the floor to vote. We don't like to miss votes, but we did want to conclude your testimony if possible, and I am sorry we have to go to the floor.

We appreciate very much your being here. You have been very helpful. Your written statement will be very helpful to us as we proceed.

If we run into questions on which we need additional help, we will feel free to call upon you.

Thank you very much.

The subcommittee will stand in recess for about 12 minutes.

Judge ROBB. We greatly appreciate it, Mr. Chairman.

STATEMENT OF WAYNE R. LAFAYE, REPORTER, ADVISORY COMMITTEE ON CRIMINAL RULES

Mr. Chairman and members of the Committee: I appreciate this opportunity to present for your consideration some comments on the proposed amendments to the Federal Rules of Criminal Procedure. Before the committee at this time are proposed amendments to existing rules 6, 23, 24 and 41, and a proposed new rule 40.1.

The purpose of this statement is to present a brief summary of the major features of these rules and the considerations which underlie them. As you know, the rules are accompanied by Advisory Committee notes which give an indication of the reasons for the various provisions. I shall not repeat those detailed comments here, but will attempt to answer any questions the committee may have with respect to any of the proposed amendments.

Before turning to the proposed amendments, it may be in order to note briefly the process by which they were adopted. These proposals were initially developed at meetings of the Advisory Committee on Criminal Rules in 1972. In January 1973, the Committee on Rules of Practice and Procedure of the Judicial Conference authorized their circulation, together with other proposals which have heretofore been acted upon by the Congress, to bench and bar for comment. A total of 5,000 copies of that preliminary draft were printed and circulated. In addition, that draft was reprinted in the Federal Supplement, the Federal Reporter, and the Supreme Court Reporter advance sheets in June 1973, which reach virtually all lawyers interested in federal criminal practice. In each instance, the cover of the Reporter drew attention to such publication, and a cover letter to bench and bar solicited comments and suggests not later than February 1, 1974. As a consequence, the Advisory Committee received numerous comments from judges, individual practitioners, and various organizations of lawyers. These comments were given close attention by the Advisory Committee at meetings held in 1974 and 1975, resulting in revision of some of the amendments presently before the Congress. The amendments in their present form were approved by the Judicial Conference in September 1975 for transmittal to the Supreme Court, and were submitted to the Congress by the Court on April 26, 1976. Pursuant to Public Law 94-349, signed into law on July 8, 1976 the effective date of the amendments now before the Committee was changed to August 1, 1977, or until and to the extent approved by Act of Congress, whichever is earlier.

Rule 6.—The Grand Jury

Two amendments are proposed to subdivision (e) of Rule 6, which deals with the grand jury. The second of these, appearing at lines 25 through 29, is merely a clarifying amendment. It substitutes "federal magistrate" for "court" in stating who may direct that an indictment be kept secret, which corresponds to the change in subdivision (f) already adopted by the Congress, namely, that an indictment may be returned to a federal magistrate. It also substitutes the phrase "been released pending trial" for "given bail" so as to conform to the Bail Reform Act of 1966.

The other amendment to Rule 6(e) elaborates the existing provision permitting disclosure of matters occurring before the grand jury to attorneys for the government for use in the performance of their duties. A sentence was added stating: "For purposes of this subdivision, 'attorneys for the government' includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties."

The added sentence is intended to make it clear that Rule 6(e) does not forbid U.S. attorneys to make use of other government personnel, such as employees of administrative agencies and government departments, when such outside expertise is necessary. This is not infrequently the case when the matter under investigation by the grand jury is complex in nature. Experience has shown that in certain types of grand jury investigations it is absolutely necessary for government attorneys to rely upon investigative personnel of other agencies. Sometimes the need is for supportive investigation by an FBI agent, sometimes for analysis of subpoenaed books and records by IRS or SEC personnel, and sometimes for evaluation of exemplars and other identification material by Postal Service or Secret Service agents.

It is important to note that the proposed new sentence fairly states an existing practice which has been consistently upheld by the courts. The Advisory Committee Note observes that though the "case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their expertise is required." Since those words were written, several other decisions have been reported in which such a procedure has been approved. See *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1976), and the numerous decisions cited therein at 1122 n. 41.

I must emphasize that the proposed amendment to Rule 6(e) only contemplates the use of grand jury information by these other personnel to the extent "necessary to assist the attorneys for the government in the performance of their duties." That is, these matters may be disclosed only for purposes relating to the grand jury investigation and the duties of the U.S. Attorney in connection therewith. The amendment does not authorize disclosure to other agencies of government for use by those agencies. It leaves unchanged that part of Rule 6(e) which permits a court to direct disclosure only "preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment." See "In re Grand Jury Proceeding," 309 F. 2d 440 (3d Cir. 1962) (FTC investigation not a "judicial proceeding").

Rule 23.—Trial by Jury or by the Court

Two amendments are also proposed with respect to Rule 23, dealing with trial by jury or by the court. The first of these is to subdivision (b), which in its present form authorizes the parties, upon approval of the court, to stipulate in writing that the jury shall consist of any number less than 12. This provision is very useful if, for example, one of the jurors should become ill during the trial and there are no alternate jurors.

It is common practice, however, for this stipulation to occur at the outset of the trial rather than at the time that a juror becomes incapacitated. That is, the parties stipulate at the outset that in the event it later becomes necessary to excuse one or two jurors, the case may proceed nonetheless. It is particularly helpful to have the matter resolved at that time, for the presence or absence of such a stipulation will provide a basis upon which the court can determine whether the time and expense of empanelling alternate jurors under Rule 24(c) is warranted.

Although this common practice would appear to be authorized by Rule 23(b) in its present form, on occasion the question has been raised as to whether a pre-trial stipulation would be effective absent a reaffirmation of it at the time a juror is excused. The language added to Rule 23(b) is intended to make it clear that the present practice is not contrary to the rule.

The second amendment to Rule 23 has to do with the making of special findings in a case tried without a jury under subdivision (c). The change makes clear the deadline for making a request for findings and provides that the findings may be oral. There is no reason why oral findings will not suffice, as they become a part of the record and thus are available upon appellate review. In its present form, Rule 23 requires a request for special findings but does not indicate at what time the request must be made. Because the Rule refers to the making of such findings upon request "in addition" to the general finding, it might be interpreted as requiring the request before the general finding, as is generally the practice, but it was concluded that the Rule should be clarified in this respect. It is by no means inappropriate to require that the request be made within that time, for it ensures that the judge will be able to elaborate his findings at a time when the evidence and other relevant facts are subject to easy recall.

Rule 24.—Trial Jurors

Rule 24(b), in its present form, allocates peremptory challenges in the following way: 20 to each side if the offense charged is punishable by death; 6 for the government and 10 for the defendant or defendants if the offense charged is some other felony; and 3 for each side if the offense charged is a misdemeanor. The proposed amendment provides for 12 for each side in capital cases, 5 for each side in felony cases, and 2 for each side in misdemeanor cases. That is, the amendment generally reduces the number of peremptories available and

also eliminates the discrepancy in the present rule concerning the number available to each side. The amendment would retain the present provision to the effect that additional challenges may be granted when there are multiple defendants, and would add a provision that for good cause shown additional challenges may be allowed in other cases. Finally, the amendment sets a time, 1 week prior to the scheduled trial date or such other time as is provided by local rule, to seek such relief.

The proposed changes in the number of peremptory challenges available are based upon a number of considerations. For one thing, reduction in the number of peremptories permitted as a matter of course will reduce the time consumed in selecting jurors and the costs of operating the jury system. The proposed numbers, it is believed, accommodate that interest, which has taken on even greater importance as a result of the Speedy Trial Act, with the purpose of the peremptory challenge: to aid each party in obtaining a fair and impartial jury. Though many states permit the number of peremptories provided for in present Rule 24, several permit fewer—the number provided in the proposed amendment or even less. See ABA Standards Relating to Trial by Jury 72 (Approved Draft, 1968).

For many years, objective observers of the American criminal justice system have criticized the number of peremptories generally available as excessive. See sources cited in Orfield, *Criminal Procedure from Arrest to Appeal* 406 (1947). There is, of course, nothing inherent in the numbers 12, 5 and 2 which make them the proper numbers for peremptories in capital, felony and misdemeanor cases, respectively. It is impossible to "prove" in some statistical way that these are the correct numbers, just as it cannot be proved that the numbers presently allowed are correct or that a jury should consist of 12 people. The collective experience of the members of the Advisory Committee has led to the considered judgment that the proposed numbers will usually suffice to fulfill the legitimate purpose of peremptory challenges: excusal of prospective jurors for suspected but unprovable bias. I stress "usually," for an important feature of the amendment is that the court is specifically empowered to grant additional challenges upon a showing of good cause. By contrast, the present rule has been interpreted as not permitting the granting of additional challenges in a single defendant case. *Estes v. United States*, 335 F.2d 609 (5th Cir. 1964). Thus, it may be said that the present rule sets the highest number of peremptories which might be needed under the most compelling circumstances, with the unfortunate effect that the same number is inevitably available in all cases, while the rule as amended sets a lesser number which ought to suffice in the overwhelming majority of cases, with an opportunity for additional challenges in special circumstances.

A second consideration underlying the proposed amendment of Rule 24(b) is the cross-sectional policy. In the Jury Selection and Service Act of 1968, the Congress declared as the express policy of the United States that all litigants "shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 18 U.S.C. § 1861. Allowing an excessive number of peremptories runs counter to that policy, for, as the Supreme Court noted in *Swain v. Alabama*, 380 U.S. 202 (1965), peremptories may be used "on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliation of people summoned for jury duty."

Finally, the proposed amendment of Rule 24(b) reflects the view that the prosecution and the defense should normally be granted an equal number of peremptory challenges. This principle of equality, of course, is reflected in the present rule as to capital and misdemeanor cases, but curiously is not the case when the charge is a felony. The Advisory Committee perceived no justification for this disparity. As the Supreme Court said in *Swain v. Alabama*, 380 U.S. 202 (1965), in speaking of peremptory challenges, "the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" Most states give the prosecution a number of peremptory challenges equal to those granted the defendant. ABA Standards Relating to trial by Jury 75 (Approved Draft, 1968). Moreover, when the Congress last dealt with this issue in enacting the District of Columbia Court Reorganization Act of 1970, it concluded, in adopting D.C. Code § 23-105, that both the prosecution and the defense should have exactly the same number of challenges.

Rule 40.1.—Removal from State Court

Proposed new Rule 40.1 would establish procedures relating to the removal to federal court of a state criminal prosecution. Subdivision (a) requires that a removal petition be filed not later than 10 days after arraignment in state court, except that a later filing may be allowed upon a showing of good cause. Subdivision (b) requires that all then existing grounds be stated in one petition for removal; a second petition may be filed upon grounds not previously existing or as permitted upon a showing of good cause. Subdivision (c) provides that the filing of a petition does not prevent the state court from proceeding further, except that a judgment of conviction may not be entered unless the petition is first denied. If the petition is granted, then the state proceedings must cease.

Removal is provided for in 28 U.S.C. § 1443. It states, in the part here relevant, that any "criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending: (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof."

The Supreme Court has given this language a narrow interpretation. In *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), the Court held that it is not enough to show that civil rights have been denied in advance of trial, that the charges are false, or that defendant is unable to obtain a fair trial. Rather, it must be shown that the state prosecution is directed at conduct by the defendant which is specifically protected by a federal law dealing with equal civil rights. Illustrative is the companion case of *Georgia v. Rachel*, 384 780 (1966). There the defendants were asked to leave a restaurant solely for racial reasons and then were charged with trespass because of their refusal. The Court concluded removal was proper, as the Civil Rights Act of 1964 conferred a right to equal enjoyment of the facilities of any place of public accommodation.

The purpose of the proposed rule is to facilitate the orderly and prompt disposition of a removal petition. Despite the very limited circumstances in which removal is actually warranted under the *Peacock* test, experience has shown that the removal process can be and often is utilized to cause serious and unjustified delay in state criminal proceedings. The potential for abuse of the existing procedures is detailed in the law review article cited in the Advisory Committee Note; as concluded in that article, such techniques as last-minute petitions on the eve of the state trial and the filing of repeated petitions and the appeal of a remand orders may seriously jeopardize the state interest in the prompt and fair enforcement of its criminal laws. This article notes, for example, that in one case "[b]y utilizing the removal procedure to its full extent, the defendants were able to avoid trial for approximately five years."

Presently, a removal petition may be filed at any time prior to trial, and such filing requires a stay of the state proceeding. This state of the law, it has been noted, can "afford a means for harassment of state judges and prosecutors and trial delay," *New York v. Horelick*, 424 F.2d 697 (2d Cir. 1970), as there is nothing to prevent a state criminal defendant from withholding his petition until the eve of trial. Subdivision (a) of the proposed rule deals with this problem by requiring that the petition ordinarily be filed not later than 10 days after the state court arraignment. This requirement is consistent with the general policy that pretrial objections should be raised and resolved in a timely fashion so that the trial of criminal cases is not unduly delayed. This policy is reflected in rule 12 of the federal criminal rules, including amendments recently approved by the Congress, and in the general trend of state criminal procedure reform, as noted and recommended in ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970).

It has been said that the purpose underlying the present law on the timing of the petition "was to deal with cases where the trial followed swiftly after the charge." *New York v. Horelick*, *supra*. Doubtless this is true, but it must be emphasized that subdivision (a) serves this purpose better. Subdivision (a) allows the petition 10 days after arraignment and even later for good cause shown, and thus ensures that the opportunity for petition may not be cut off by the state rushing the defendant to trial. Except in extraordinary circumstances, which may be dealt with under the good cause provision, 10 days following arraignment provides ample time for the filing of any meritorious

petition. Given the limited crime-is-a-right basis of *Peacock*, there is no reason why counsel cannot file the petition well within this time.

As for subdivision (b), it is by no means unfair to require that all grounds be set out in the petition and to permit a later petition only on grounds not previously existing or upon a showing of good cause. Given the limited grounds for removal, there is no reason why they cannot ordinarily be asserted in one petition. Subdivision (b) alleviates the problem of continual disruption of state court proceedings by successive petitions for removal.

Finally, subdivision (c) provides that, pending a decision by the federal district court on the petition for removal, the state may continue its proceedings short of entering a judgment of conviction. This provision is intended to discourage the filing of frivolous petitions when the only purpose is to cause delay and to disrupt the state proceeding. This is a desirable change from existing law, where, under the state court loses all jurisdiction to proceed immediately upon the filing of the petition. This automatic stay procedure has led to abuse of the removal process.

Rule 41.—Search and Seizure

The addition to subdivision (c) of Rule 41 authorizes the issuance of a search warrant upon oral testimony. In brief, the procedure which would be authorized under the proposed amendment is as follows: The applicant, which must be either a federal law enforcement officer or an attorney for the government, must first persuade the magistrate that the circumstances of time and place make it reasonable to proceed in this way, as where delay in obtaining the warrant might result in destruction or disappearance of the evidence to be seized. The applicant must then orally state and swear to facts which satisfy the probable cause requirement. This statement must be recorded at that time. This may be accomplished by use of a mechanical recording device, by use of a court reporter, or by the magistrate making a verbatim contemporaneous writing. The statement will thus be available in the event of a later challenge to the search warrant. After transcription, this statement must be certified by the federal magistrate and filed with the court. The applicant will then read the contents of the warrant to the magistrate so as to ensure that the magistrate will know that the Fourth Amendment particularly requirements are met. The rule explicitly recognizes that the magistrate may direct that changes be made in the warrant. If the magistrate approves, he authorizes the applicant to sign the magistrate's name to the duplicate warrant, and the magistrate then causes a written copy of the approved warrant to be made. He also enters the exact time of issuance on the face of the warrant. Upon return of the warrant, the magistrate is to require the applicant to sign a transcribed copy of the sworn oral statement.

The purpose of the amendment is to encourage resort to the search warrant process when the circumstances are such that it appears the traditional written-affidavit process might well result in the loss of critical evidence. If, as the Supreme Court has so often stated, it is desirable that law enforcement agents "secure and use search warrants whenever reasonably practicable," *Chimel v. California*, 395 U.S. 752 (1969), then it is certainly appropriate to make use of modern technology in order to broaden the range of circumstances in which the warrant process is practicable. The oral search warrant procedure has been strongly recommended by the National Advisory Commission on Criminal Justice Standards and Goals, is currently authorized by law in at least two states, and is under consideration in other jurisdictions. Experience with the procedure has been most favorable. In California, for example, there has been a dramatic increase in police utilization of the warrant process following enactment of a comparable provision.

The oral search warrant process meets all of the requirements of the Fourth Amendment. The benefits of the process far outweigh its disadvantages. One purported disadvantage is that demeanor evidence, from a face-to-face confrontation between the applicant and magistrate, is lacking. But in light of the clearly established Fourth Amendment doctrine that law enforcement officers, as compared to informants and the like, may be presumed to be credible for purposes of the probable cause determination, this is not a substantial problem. The other possible disadvantage is that the magistrate, at the time he decides to issue the warrant, does not have the facts before him in writing. While it is true that he thus cannot read and re-read the allegations while pondering the probable cause issue, he of course can make such additional inquiries as may seem appropriate—either a restatement of the allegations or an elaboration of them.

Indeed, it may well be that a magistrate is more likely to ask for some elaboration in response to an oral statement than when he is simply confronted with a completed written statement in the form of the traditional affidavit.

From either a law enforcement or civil liberties perspective, the advantages of the procedure provided for in the proposed amendment to Rule 41(c) are substantial. Not infrequently, federal law enforcement officers are confronted with situations in which there are serious doubts whether, if the officer travels to a magistrate and obtains a warrant by traditional means and then returns to the scene of the investigation, the evidence will still be where it is presently believed to be. It is neither desirable nor to be anticipated that the officer will simply abandon the investigation in such circumstances. But in the absence of the oral search warrant device, the officer is likely to engage in other practices which, at least on occasion, may threaten to a greater extent those values protected by the Fourth Amendment.

One possibility is that the officer will simply proceed to make the search without a warrant in the hope that he will later be able to convince the court that he was justified in doing so because of "exigent circumstances." While there is a fair amount of authority, particularly of recent vintage, that even a dwelling may be searched without a warrant if the circumstances are truly "exigent," there is considerable dispute as to precisely what it takes to meet that test. Thus, from either a law enforcement or civil liberties point of view, that is not a particularly attractive alternative. Another possibility is that the officer will take "protective custody" of the premises to be searched, that is, enter and monitor the movements of the occupants, while another officer makes the trip to the magistrate for a warrant. But the extent to which this alternative may be employed consistent with the Fourth Amendment is uncertain at best. Finally, the officer on the scene might phone in his facts to some other officer who is near the magistrate, who will then serve as the affiant. While this is permissible under the Fourth Amendment, it is by no means a desirable practice, for it deprives the magistrate of the opportunity to examine that officer who is in the best position to answer any questions he may have relating to such issues as probable cause, what place is to be searched, and what items may be searched for and seized.

Mr. MANN. The subcommittee will come to order and resume its hearing on the pending amendments to the Federal Rules of Criminal Procedure. We have received a request to cover the remainder of this hearing, in whole or in part, by means of photography. The subcommittee will grant this request unless there is objection.

Hearing none, it is so ordered.

Our next witness is David Epstein of Washington, D.C., who will testify on behalf of the American Bar Association. Mr. Epstein is a partner in the law firm of Berry, Epstein & Sandstrom and has served as an adjunct professor of law at the Georgetown University Law Center.

We are pleased to welcome you today. The prepared statement you have submitted will, without objection, be made a part of the record and you may proceed as you wish.

TESTIMONY OF DAVID EPSTEIN, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION

Mr. EPSTEIN. Thank you.

I am David Epstein, and I appear today as the designated representative of the American Bar Association to present its views on the proposed amendments to the Federal Rules of Criminal Procedure. Criminal justice section Chairman Alan Y. Cole looked forward to presenting the ABA's views to this subcommittee; unfortunately, he is seriously ill and unable to testify today.

I am a member of the criminal justice section and a member of the section's Committee on Rules of Criminal Procedure and Evidence.

Lawyers confront procedural changes with both passion and concern. The passion is frequently generated by the change of habit and uncertainty caused by any new way of doing things. After the adoption of new rules, the passion subsides and the changes become acceptable, then familiar, and finally, traditional. Our presence here is based on the more fundamental and lasting concern, founded on the recognition that procedural rules may have far-reaching substantive implications. The steps of the criminal justice process can affect the result—guilt or innocence. In addressing these amendments, the ABA has focused on their implications. Because of the diverse views within the organization, it is well able to do so.

The process of ABA consideration of rule changes is itself designed to grind fine the materials under review. Every segment of the criminal justice system is represented in the formulation of ABA positions. The proposed amendments were first carefully studied by a committee which included among its members Federal prosecutors and representatives of the Department of Justice, a U.S. district court judge, law professors, and lawyers active in the defense of criminal cases in the Federal courts.

I might add, parenthetically, that my own experience is as prosecutor, defense lawyer, law professor, and as an author on rules of criminal procedure. So I am a microcosm of embodying the diversity of ABA views. Therefore, when I look at these rules, I am trying to balance my particular interests and background.

The governing council of the criminal justice section is broadly representative of the many different viewpoints encompassed by the section. It adopted some proposals and rejected others and made a few of its own. I emphasize that the section's recommendations reflect a balancing of attitudes and are not weighted in favor either of the prosecution or the defense. In turn, the council's recommendations were debated prior to adoption by the ABA House of Delegates, national representative of the more than 200,000 members of the ABA.

In general, the American Bar Association supports the proposed amendments except as hereinafter noted and subject to the following suggested changes.

I would summarize by saying that the ABA shares some of the misgivings that have been voiced here this morning with respect to the proposed changes to rule 6(e).

While recommending approval of the proposed amendment, the ABA urges that an explicit legislative statement be made that the only purpose of the amendment is to provide the Government with the expertise of other governmental personnel, where needed; and that each governmental department or administrative agency has the obligation to insure that the grand jury information disseminated to its experts is not used in violation of any constitutional rights, in unrelated criminal cases, or in any civil proceedings.

ABA members expressed the strong concern that disclosure to a broader group of Government personnel might be used as a subterfuge by some agencies to obtain information through the grand jury process which was not legitimately required for the purpose of the pending

grand jury investigation. The ABA thus urges that the legitimate aim of the amendment—to provide attorneys with the assistance of experts in cases requiring specialized knowledge—be clarified via a legislative statement. The dissemination of information to serve particularized departmental or agency needs would not be a legitimate aim.

Therefore, while we don't have any specific language for inclusion in the rule, we do have this strong concern. My personal view would be that if there is to be restrictive language, it not set forth a procedure requiring appearance before a court each time an expert is used because of the administrative burdens that might result. I personally would see a great need for restrictive language. I think the ABA position is that there is no objection to any specific restrictive language. As I said, we have these misgivings which resulted in this particular approach, that of having a legislative statement.

Mr. MANN. You have reference there to the legislative history, either in the committee report or as a statement somewhere, but not as a part of the rule itself.

Mr. EPSTEIN. That is our position. The ABA would not oppose something in the rules, but in trying to bring these various views within the ABA to some kind of conclusion, we agreed upon the position that it would be in the legislative history. As I said, the ABA has misgivings about what might occur if some of the excesses that have been brought forth were to become part of normal government routine.

Mr. MANN. With reference to any possible showing of need by the attorney for the Government, the suggestion was made in testimony yesterday, I think by Mr. Segal, that perhaps the attorney for the Government should be required to file an affidavit with the court. It would be accepted presumptively by the court without any further action by the attorney for the Government being required, no motion, and so forth.

Do you think that would be burdensome?

Mr. EPSTEIN. I think if you are discussing a proposal to have an application filed with the court setting forth who was going to be brought in, which outside government agency and which personnel were going to be involved, that I don't think would be burdensome at all for the prosecutor. I think that would happen in the normal course and there would be a record of who was brought in from the outside, from the other Government agency. It would allow some kind of oversight by the defense attorney because he would know what is happening and how broadly the Government is going in terms of bringing in other people. That is a very sensible suggestion.

Mr. MANN. Thank you very much.

Mr. EPSTEIN. As far as rule 23, "Trial By Jury or By The Court," under a "Jury of Less Than Twelve," the ABA supports the proposed amendment to rule 23(b). Our statement here essentially sets forth what that rule is. There has been earlier discussion, so I will go on to 23(c), "Trial Without a Jury."

Our modification of the language is that we question the advisability of the proposed amendment which requires a party to make a motion for a special finding before the court has made the general finding. Such a request by the defense or prosecution in advance of the court's decision as to the general finding might well indicate a lack of con-

fidence in a favorable outcome of the case—and could, in fact, affect the court's decision as to the general finding. The ABA believes no convincing reason exists for requiring such an advance request. Indeed, in civil litigation, the court is required to make special findings absent any request from the parties. (Rule 52(a), F.R.Civ.P.) At the time the court makes the general finding, it certainly knows its reasons for the action, and can then either orally before a court reporter, or in writing, set forth the facts forming the basis of the decision, unless both parties agree to waive such special findings. The proposed ABA language modification would meet these concerns.

Mr. MANN. Mr. Hyde, any questions?

Mr. HYDE. I agree that the proposed amendment puts a burden on defense counsel, or anybody, as well as on the court. Depending upon the results, you may not want any findings of fact. You may be very happy with the result. If you tell the judge, "Now, your Honor, before making your ruling, I want you to do this," you would run the risk of his displeasure, however subtle. So I just agree. I think findings of fact should be available when necessary and that may never be, but it could be after the verdict.

If I may just go back briefly, Mr. Chairman, with your permission, to 6(c), I agree with the statement that the witness has made, that there ought to be an explicit legislative statement that the only purpose of the amendment is to provide the Government, et cetera. But where should that statement be made?

In my opinion, I would like the rule drawn so that it specifically sets forth that these additional personnel are necessary for the fulfilling of the purpose of the prosecution in this grand jury and for no other purpose. One of the problems with the law is that the meaning of some sections is spread all over legislative history and case law, and it just makes it tough on everybody.

If we could specify that the prosecutor who wants this additional help should specifically get leave for it and set the purpose for it with the proviso that the information divulged is for the purposes of this grand jury and that everybody involved is going to be inhibited by that caveat or proviso, that might be well.

Is it possible to draft this rule to encompass those things?

Mr. EPSTEIN. Mr. Hyde, I believe you make an excellent point as far as how someone finds legislative history when they have only the rule in front of them. As I indicated to Mr. Mann, the ABA would have no objection to having that incorporated in the rule. My own question would be whether setting up a procedure requiring an appearance before a judge every time the prosecutor wants to use a government expert is not involving too much administrative burden on the courts, the prosecution, and defense, and so forth.

The suggestion that was made yesterday by one of the witnesses, of having the prosecution file an affidavit—

Mr. HYDE. Fine.

Mr. EPSTEIN. [continuing]. Which is self-executing, unless somebody raises a question about it, sounds like a sensible approach to this and I think one that could be incorporated into the rule.

Mr. HYDE. Could we devise a form of affidavit that would include the language that the affiant certifies—well, he can't bind an IRS agent. The U.S. attorney would sign that.

Mr. EPSTEIN. The affiant could also, or the expert could also, sign that he agrees not to disclose anything he learns.

Mr. HYDE. I think that would be great if we could crank that into a rule. Then the defendant, as you pointed out, would have access to that, and later on when he is being prosecuted by the SEC and certain things come out, he can make the connection, and at least argue and require some testimony that he has been doubly dealt with.

Mr. EPSTEIN. Since his identity is known, that overcomes a great burden that defense lawyers have in trying to find out who did what. Very often Government personnel change and records get lost, and so forth. Here there would be a record in the court.

Mr. HYDE. Different judges rule differently on the same situation and I think the more specificity we could crank into the rule, the better it would be. I don't like to encumber rules with long rhetoric, but the real problem we are getting at is the multiple use of information before a grand jury. We certainly need to liberalize that system to provide information when we get into highly complicated, technical data, but we have to be careful to limit its use. I would hope all the talent we are hearing from could help us put together a rule that would really do that.

Thank you.

Mr. EPSTEIN. Continuing on page 4 of my statement on rule 24, the trial jurors, peremptory challenges.

The proposed amendment to rule 24(b)(1) was forcefully opposed at every level of ABA consideration, with few exceptions of support for this change. The proposed amendment to rule 24(b)(1) would reduce and equalize the number of peremptory challenges available to defense and prosecution. The number of peremptory challenges would be reduced from 20 to 12 for both sides in capital cases; from six for the Government and 10 for the defense down to five for both sides in felony cases; and from three down to two peremptory challenges for both sides in misdemeanors.

The ABA strongly opposed the amendment's reduction and equalization of peremptory challenges; this opposition was unanimously expressed by the section's council at its November 1976 meeting. The ABA urges retention of the existing number and allocation of peremptory challenges for capital cases, for felony cases, and for misdemeanors, as contained in the current rule.

The advisory committee fails to make a convincing case for the change. It argues that reduction and equalization of peremptory challenges between prosecutor and defense will result in (1) petit juries selected at random from a fair cross section of the community; and (2) an acceleration in voir dire procedure and a savings in juror costs through the use of smaller jury panels.

There is no basis upon which to conclude that equalizing the number of challenges will serve to increase the likelihood of random selection. In the opinion of many experienced litigators, the proposed amendment will unnecessarily advantage the prosecution, which in most cases has more knowledge about the past behavior of jurors.

As for acceleration of voir dire and reduction in costs through the use of smaller jury panels, quite the contrary is as likely to occur. Defense lawyers, stripped of the limited potential of peremptory challenges, may feel compelled to engage in more exhaustive voir dire and

to make more challenges for cause. The trial court's disallowance of such challenges may later become the basis for appellate review, adding substantially to the cost of resolving the case.

I might add that based on informal conversations with prosecutors—here where they are working under both systems—the Federal court is under the Federal rules but the superior court is governed by the District of Columbia Code enacted by the Congress and peremptory challenges are equalized—I am advised informally, though I have no convincing scientific basis for this, that in the superior court it takes more time to conduct voir dire than in the district court. In the district court, it takes about 1½ hours, and in the superior court, 2 to 2½ hours. The district court judges take time to do the voir dire themselves and that really cuts down the time.

There is no convincing basis to suggest that limiting the number of peremptory challenges or equalizing them will in any way reduce the time involved in impaneling a jury and, in fact, the time involved is not so substantial that it is a major problem.

Mr. MANN. You may proceed.

Mr. EPSTEIN. Thank you.

On the (b) (2) part of the section, the ABA supports this portion of the rule, except that it urges modification of the language, as set out above. Proposed (b) (2) would give the court discretion to increase the number of peremptory challenges, and spells out the time within which such a motion for relief must be made. The ABA's proposed language modification would meet a need to allow the court flexibility "in exceptional circumstances" to grant a motion for additional challenges, even if the motion is filed less than 1 week ahead of the first scheduled trial date.

Mr. HYDE. Mr. Chairman.

Mr. MANN. Mr. Hyde.

Mr. HYDE. What is wrong with letting the attorneys make the request for additional peremptories when you have got a room full of prospective jurors? Something may occur then where the need may just arise at that moment. I hate to draw silly pictures, but you may have a white defendant and a black complaining witness, and you end up with 70 percent of the room—which you don't know until you get in there—prospective black jurors. I am picturing a very extreme case.

My point is that many times you don't know you are going to need extra peremptories until people have been challenged for cause and you are left with three accountants, a guard, and a retired general of the Army. You don't know until you are right there at the time.

What harm is done by asking the court in chambers under the circumstances—your having just discovered that you have adverse interests on many things—for permission to do that? I don't see any harm in that.

Mr. EPSTEIN. It is the effect, Mr. Hyde. I believe the concern would be that if you are going to ask for 10 more peremptory challenges, you have got to bring in another 30 people for the prospective jury panel. The jury panel that would have been summoned for that day might not be sufficient to service that court and all the other courts that are involved. So I think that would be the concern.

If you have advance notice, you are able to arrange a week in advance without disrupting too many potential jurors' lives by just hav-

ing them sit around the courthouse, which apparently is a big problem in and of itself. This way, you give advance notice and you are able to gear them in and bring them in sufficient numbers so that the peremptory challenges—

Mr. HYDE. And you would be saved from the unusual situation by the proposed language which says "or at such other time as may be provided by the rules of the district court."

Mr. EPSTEIN. We would put "in exceptional circumstances." We would recognize the kind of situation you posited, where there may be a need as you walk in for more jurors because of the composition of the panel or the unusual nature of the case that is before it. There may be certain things that have surfaced only in the last day or so before the case. Let's say a newspaper article suddenly comes out the morning of the impaneling.

Mr. HYDE. That is a much better analogy than the one I gave. That is more likely to happen.

Thank you.

Mr. MANN. Mr. Epstein, the amendment in (b) (2) seems to allow the court to permit additional peremptory challenges for both the prosecution and defense. Under the present rule, only the defense may be permitted additional peremptory challenges by the court. That would also apply in the multiple defendant situation. That is a change from the present rule.

Mr. EPSTEIN. I must say that is an excellent point and I don't think the committee that considered it focused attention on it.

Mr. MANN. I think the intent is very good.

Mr. EPSTEIN. I think there must be "good cause shown" and then you have a standard of some sort. At least you have good cause shown. There may be circumstances in which the prosecution should have more peremptory challenges in order to equalize the situation as it exists in the normal case. But I don't think a great deal of attention was focused on that particular issue that I am aware of.

Mr. MANN. Given the Judicial Conference's motivation in this matter, it appears, in effect, that they want to even them up.

Mr. EPSTEIN. If they can't even them up as far as the rule is concerned, then they could only even them up as far as the exception is concerned, and there they would have to show good cause. So perhaps it would only truly be used in those situations where good cause is shown, rather than becoming the normal way, with judges making their own law in order to even it up, even if the Congress should keep the rule as it is right now.

Mr. MANN. All right.

Mr. EPSTEIN. Under rule 40.1—

Mr. MANN. Mr. Smietanka has a question.

Mr. SMIETANKA. Excuse me. I want to ask one question with relation to the peremptory challenges.

In an issue of "Psychology Today" in May of 1973, Mr. Keith Mossman, who was the chairman of the American Bar Association section of criminal law at the time, wrote an article in which he said.

Like successful poker players and other gamblers, most criminal trial lawyers have acquired some "superstitions" in their attitude toward jury selection. A nationally known trial lawyer once told me that he would not accept any left-handed jurors. Along with occupational criteria, some of the old men of the

trade thought that nationality played a crucial role in jury selection. According to the maxim, jurors of southern European descent tended to be more sympathetic to a defendant than did more exacting jurors with German or Scandinavian blood. These bits of legal lore will always exist. Lawyers will continue to try to pick jurors favorably disposed to their clients.

My question is: Is there any place in the rules of criminal procedure to indulge this superstition by giving one side or the other an advantage in peremptory challenges?

Mr. EPSTEIN. I don't think you are really giving an advantage to the defendant. The prosecution—insofar as information may give the prosecution an advantage in knowing about the prospective behavior of jurors—the prosecution has the greater access to that information because they keep jury books. They know how particular jurors have acted in other cases that have gone on during the course of that particular panel's life and how this particular juror was involved in an actual case and how that case was resolved, or whether that particular juror was the one that caused a hung jury. So the prosecution has the advantage.

Equalizing the number of peremptory challenges isn't going to do away with using the superstitions, or whatever other basis you have, for making your judgment. It will just mean that both sides will have fewer chances to—or, rather, the defense will have fewer occasions and, actually, both sides—to use those peremptory challenges. But a lawyer is still going to be making those peremptory challenges on some kind of basis.

It is a rare case where you have an opportunity to go through psychological testing and spend the kind of money spent in some of the more celebrated cases in recent years, where psychologists say they can tell you how a particular juror is going to react. That is a separate problem—whether it is a good idea or not to have psychological testing and have peremptory challenges on some scientific basis. In 99 percent of the cases, you don't have that.

Our position is that there is no reason to change the rules from the way they are, based on the information that is presented. There will be no speeding up of the jury selection which, we say, is a de minimis consideration in the course of a trial, nor is it going to result in a more random jury selection. The random selection arises out of both parties having the jury panel limited to 24 or 30 people who are in the room, and if they kick off one or two people by peremptory challenge, the next person is coming on anyway. So even with the challenges you have, you cannot affect very radically the composition of the jury, but you can feel some degree of superstitious self-confidence or hunch that you have gotten the person off who is going to vote against your client. Also, the defendant may feel he is participating, saying, "I don't think that person will treat me fairly" for any reasons the defendant brings to the proceeding.

So I don't see that that article is really going to solve the problem or that it really makes a case for changing the rule.

Mr. SMETANKA. In fairness to Mr. Mossman, he wasn't arguing either way.

Mr. MANN. All right, you may proceed.

Mr. EPSTEIN. Under rule 40.1, removal from State court, time for filing, proposed rule 40.1 details the procedure to petition for removal

of a criminal prosecution from a State court. It is intended, according to the Advisory Committee Note:

To facilitate the orderly and prompt disposition of a removal petition filed in Federal court and to avoid unnecessary delay in the State proceeding when a removal petition is denied.

The ABA believes the timing provision proposed in (a) to be unrealistic. It supports modified language in 40.1(a), as spelled out above. The parties cannot be expected within 10 days after State court arraignment to make a decision as to whether a basis exists for removal to a Federal court. Further, if such a motion were filed sufficiently in advance of the State court trial proceeding, 15 days is regarded as sufficient, the Federal court then has ample time to decide whether the case should be removed. The judgment is thereby made without interfering with the State court trial process. The proposed modification of language will meet these deficiencies.

The reason we have 10 days after the State court arraignment is that we are concerned about a State court that might set trial within less than 10 days and then the parties wouldn't have adequate opportunity. At least you have the 10 days after the State court arraignment. It falls into the period within 10 days after the arraignment and within 15 days before the first scheduled trial. That's ample time for consideration of the removal.

We have not addressed the question raised by Ms. Holtzman whether this proposal is in conflict with legislation and the power to amend legislation by rule, which may or may not be the case as far as this legislation is concerned.

As far as the number of petitions, subdivision (d) would mandate inclusion of all existing grounds for removal in a petition for removal, and would allow a second petition only if the grounds stated therein did not exist at the time the original petition was filed, or for other good cause shown. The Advisory Committee note declares that the purpose of this proposal is to alleviate "the problem of continual disruption of State court proceedings by successive petitions for removal."

The ABA supports this proposal with modification of language set out above. The ABA believes the rule would properly seek to avoid the disruption of proceedings in the State courts, but nonetheless feels it unrealistic to require that a failure to set forth grounds "which exist at the time of the filing of the petition shall constitute a waiver of such grounds." Under the U.S. Supreme Court language, if grounds exist at the time of the filing which are not known or discoverable with reasonable diligence by defense counsel, that could constitute waiver by the defendant.

The ABA therefore recommends a modification of the language to meet the legitimate purpose of avoiding disruptive tactics—while avoiding penalizing the defendant when defense counsel is not aware of the grounds relied upon in a successive petition, after he or she initially has exercised reasonable diligence.

Proposed rule 40.1(c) is intended, according to the Advisory Committee note, to "discourage frivolous petitions when the only purpose is to cause delay and to disrupt the State proceeding." The ABA believes, as a result of the time restrictions and waiver provisions provided in (a) and (b), that the removal question will be decided

well in advance of the State court trial. Allowing the State court trial to proceed even if a petition for removal is pending should have no significant practical consequences, and the ABA supports 40.1(c) as proposed.

Mr. MANN. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I wanted to point out to Mr. Epstein that the statutory language with respect to the removal procedure is very clear. There is no time limit in the present statute within which a removal petition must be filed. Similarly, it's explicitly stated by statute that all State court proceedings must be held in abeyance once a removal petition is filed with the court. Rule 40.1 purports by rule to overrule explicit statutory language. I think that raises very serious problems of constitutionality, statutory construction, and serious problem of compliance.

I don't know that the ABA has considered that, but I just wanted the record very clear so that there is no question that this proposed rule encompasses provisions now set forth in explicit statutory language. It's my opinion that, if this rule were allowed to go into effect without Act of Congress, the litigation over the adoption of this rule would be more disruptive of State court proceedings in removal cases.

I would like to ask whether the ABA has done any analysis of the present removal practice to determine whether or not there has been a series of abuses and thus whether a change in proceeding is warranted.

Mr. EPSTEIN. I am not aware of any. In response to your earlier comment, our position in viewing the rules was taking the rules and working from that. We assumed, and perhaps unjustifiably so, that the committee which had labored long and hard on this, the Advisory Committee, had considered the interrelationship of the rules to the legislation and we were bringing attention to the rule rather than to the whole context in which this particular removal legislation arises.

I am not aware of any study on how much of a problem it really is. Our concern is if it's going to be along this line the time period that the Advisory Committee sets out is one that cannot be followed.

Ms. HOLTZMAN. I agree with you about the time period, but I wanted to know whether you or the ABA had done any study independently to warrant its recommendation in No. (c) or to warrant any changes in the present practice at all.

Mr. EPSTEIN. We don't have a basis on any study we have done for saying that the problem is an acute one. One of the members of the committee which first considered this was Judge Kaufman of Baltimore. I believe he made some reference to being confronted with a situation where the removal problem comes before him, and the State trial is supposed to start the next day or that night, and he is going out of town on a trip or whatever. A helter-skelter atmosphere arises when there is not adequate time to consider because the State case is ready to go to trial and suddenly a petition is brought to you for consideration.

You have got your mind on a hundred other matters and you really can't give it the kind of consideration that you should. Then, if you stop the State court, you have undone a whole process there and perhaps without justification.

As I recall, that was the kind of experience that he brought forth for consideration here.

Ms. HOLTZMAN. You have more problem with the judge than with the statute?

Mr. EPSTEIN. Well, it's a problem with the judge, and he is suddenly confronted with having to make a decision that, even if he decides that he is going to wait on making a decision, may affect the State court and keep it from going forward. The whole trial and the witnesses and so forth have already been put together and that is a rather complex process.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Mr. HYDE. Mr. Chairman?

Mr. MANN. Yes, Mr. Hyde?

Mr. HYDE. Counsel has pointed out to me chapter 237. This is the Rules Enabling Act. It says in section 3771 that all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. So this is a statute which says all laws that conflict with the rules will be of no force and effect once the rules are——

Ms. HOLTZMAN. Will the gentleman yield?

Mr. HYDE. Surely.

Ms. HOLTZMAN. It is not clear to me what the rules of civil procedure contain on this point, however.

Mr. HYDE. Excuse me. It does the same thing for the rules of civil procedure. Here, I'll show it to you. This is civil and this is criminal.

Ms. HOLTZMAN. I stand corrected. In any case, one would have a question as to whether or not that language means explicitly that statutes written by Congress and enacted after the signature of the President could be overridden in any case in this manner.

Mr. MANN. This is another reason why we should look into the enabling acts. All right, Mr. Epstein.

Mr. EPSTEIN. Addressing myself to rule 41, search and seizure, the proposed rule 41 amendment would establish a procedure whereby search warrants could be issued over the telephone (or radio or other electronic means) when it is not reasonably practicable to obtain a warrant by presentation of a written affidavit to a magistrate or State judge. Arizona and California currently allow such a practice. According to the Advisory Committee note:

Federal law enforcement officers are not infrequently confronted with situations in which the circumstances are not sufficiently exigent to justify the serious step of conducting a warrantless search of private premises, but yet there exists a significant possibility that critical evidence would be lost in the time it would take to obtain a search warrant by traditional means.

The step-by-step procedures for orally obtaining a warrant are spelled out in the proposed amendment.

The ABA supports this proposed amendment. The ABA is persuaded that it is preferable to encourage maximum use of an impartial judicial officer to weigh probable cause before deciding whether a warrant should be issued—rather than to have a law enforcement officer proceed without any warrant, due to a reluctance to take time to obtain a warrant in person, and instead seek to justify his or her action on the grounds of exigent circumstances.

There are many arguments supporting maximum use of warrants over the telephone. The magistrate can electronically record the con-

version so that he or she can accurately prepare a written summary of probable cause at the conclusion of the telephone conversation; this can then be carefully assessed. This also might serve as a way of checking that the person making the application is a law enforcement official.

The ABA feels that the opportunity to weigh credibility during a personal appearance before a magistrate is overstated. Indeed, in a warrant application via telephone there perhaps exists a greater likelihood that the magistrate will actually discuss probable cause with the investigating officer.

"Although the procedure * * * contemplates resort to technology which did not exist when the Fourth Amendment was adopted," the Advisory Committee note asserts, "the procedure complies with all of the requirements of the amendment." The section supports the proposed amendment.

Mr. MANN. Ms. Holtzman.

Ms. HOLTZMAN. Mr. Chairman, thank you for giving me another opportunity to question. Mr. Epstein, you mentioned on page 9 that there will be a greater likelihood that the magistrate will actually discuss probable cause with the arresting officer in a telephone conversation. What is the basis for that statement?

Mr. EPSTEIN. Under the current procedure, Ms. Holtzman, the officer comes before the magistrate in person, but he need not be the person who actually has first-hand knowledge of the basis for issuing the warrant. He can be someone who says, "I swear on information and belief furnished to me by Officer So-and-So, who was told by a reliable source such-and-such," so there is a rather long train of people who may be involved in making a presentation before a magistrate.

The reason that that happens is because the investigating officer may be located at the scene or near the scene of the crime or the investigation or whatever and he is conducting some kind of surveillance or needs to keep on top of the situation and doesn't want to take the 2 or 3 hours or more that may be involved in some districts to come in, to appear before the magistrate, and then go back.

So he would convey the basis for the warrant to some other person who would then come before the magistrate. So there is really no opportunity, the way it is now, for the magistrate to do much more than to say, "You're a law enforcement officer and you're telling me this is based on information that you have gathered, that this is accurate and that there is a basis for issuing a warrant."

If you had the electronic means then the officers out on the scene can call and say, "I'm here and here is what I see and what I know."

The magistrate can then say, "Have you done this and what do you know about that?" which would allow a greater conversation to take place in terms of making sure that there is really probable cause if anything troubles the magistrate in issuing it.

Now, the magistrate is likely to resolve doubts in favor of issuing the warrant or the officer on the scene resolves doubts in favor of saying, "This is an exigent circumstance and I have just got to go ahead and do it without a warrant because I haven't got time to come back to the magistrate," or, "I am just not going to do it that way."

In our view, this proposal has realism to it and would encourage, we think, the likelihood that the magistrate would be involved in assessing

probable cause with the person or persons who have the information to give him.

Ms. HOLTZMAN. There is nothing in present procedure precluding the magistrate from discussing on the telephone in addition to the investigating officer telling him about it. There is nothing to preclude the magistrate from discussing with the investigating officer the probable cause or the facts on which the affidavit is requested.

Mr. EPSTEIN. The fact is that he has the person there but there may be a problem of connecting with the individual who actually has the information. The officer on the scene has the information. He conveys it to some colleague who then takes the information down and types it up and prepares an application, which is then brought to the magistrate. A period of hours might elapse. Before you finally have access to the magistrate more time might go by. Then you have the problem of trying to locate the investigating officer and getting him to the phone in order to answer any questions the magistrate might have.

That might happen in some cases but I would imagine and I would judge that in most cases that doesn't happen, the magistrate, in the normal course, would make his ruling based on the information presented to him by the officer.

That really is who is swearing under oath that this is the basis for the application.

Ms. HOLTZMAN. That may suggest a fault in the present practice in the sense that the magistrate may not have adequate information before him on which to make decisions. I'm not sure that the conclusion from that is that one abandons the procedure whereby there is a personal appearance before the magistrate, an oath taken before the magistrate, an opportunity to question based on a document, and an opportunity to confront, on a face-to-face basis, the person being sworn.

Mr. EPSTEIN. Are you referring to having the actual investigating officer always appear before the judicial officer?

Ms. HOLTZMAN. No, but I am saying if you think it is so desirable, and I happen to think it probably is desirable, to get the facts first-hand in order to decide whether to issue a warrant, something ought to be done to improve the present practice. I am not sure that the deficiency in the present practice is solved by substituting a personal appearance with a telephonic appearance by the police officer or some other representative of the Federal Government.

Mr. EPSTEIN. In our view there is very little to be gained by insisting upon the physical appearance of the person. It's the information that he has. Is this the person who gathered the information and does he have a basis for making that statement. And having him personally appear, for example, in a district like Wyoming where you have to travel hundreds of miles to find the judge, is just a very substantial commitment of time.

Ms. HOLTZMAN. I guess I have the feeling that the intrusion of the Government into the personal privacy of an individual is a serious enough action that it should be carefully circumscribed. It is for that reason that I have a great deal of hesitancy about this proposal. My own judgment is that the rule is so drafted that the telephone call will become a substitute for the present searches with a warrant and I am not sure that is a desirable thing.

The word "reasonable" is a very broad one. It is not "necessary." The standard is not necessity. It is not emergency. It is "reasonable." That's a major step in loosening the requirements for the issuance of a search warrant.

Thank you, Mr. Chairman.

Mr. HYDE. Mr. Chairman, I don't have a question, but just a comment on this point. Ever since I first sat in a legislative body I have heard legislation characterized as dragging Illinois or the Government into the 20th century, kicking and screaming. This is what this does. It seems to me this is precisely what this does. It recognizes there is such a thing as a telephone. I see all of the safeguards present, the recording, the later signature, the perjury penalty. So I think it's a progressive step and can even be protective of wrongful invasion of privacy.

Mr. MANN. Do you care to conclude your statement, Mr. Epstein?

Mr. EPSTEIN. In closing, I would like to advise the committee that while the ABA has supported the Enabling Act, that is, that rules and amendments to rules should be promulgated by the Supreme Court and become effective after transmittal to the Congress, the criminal justice section has urged that the Enabling Act can be effective only if drafts of proposed rules and amendments are circulated widely in advance of their promulgation in sufficient time to allow diversified segments of the bench and the bar an opportunity to comment thereon.

Professor LaFave says there was an opportunity but the rules circulated a few years ago bear only faint resemblance to what actually came forth and is now before this committee. The ABA did not have an opportunity to comment on these rules before they were promulgated or have any significant opportunity to make suggestions.

Some of our suggestions are based on, we think, a very wide experience within the profession as to what the implications would be.

In fairness, I would say the recently proposed new rule dealing with appellate review of sentences was circulated for discussion and comment in a timely fashion.

On behalf of the American Bar Association, which I am honored to represent before these Members of Congress, I want to thank the committee for providing us with an opportunity to comment on the proposed amendments and to urge support of the foregoing.

Mr. MANN. Thank you very much, Mr. Epstein. You have been very helpful.

STATEMENT OF DAVID EPSTEIN, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION

Mr. Chairman and members of the subcommittee: I am David Epstein, and I appear today as the designated representative of the American Bar Association to present its views on the proposed Amendments to the Federal Rules of Criminal Procedure. Criminal Justice Section Chairman Alan Y. Cole looked forward to presenting the ABA's views to this subcommittee; unfortunately, he is seriously ill and unable to testify today.

I am a member of the Criminal Justice Section and a member of the Section's Committee on Rules of Criminal Procedure and Evidence. In professional life, I am a partner in the law firm of Berry, Epstein, and Sandstrom in the District of Columbia and I specialize in the trial of criminal and civil cases in Federal courts throughout the United States.

Lawyers confront procedural changes with both passion and concern. The passion is frequently generated by the change of habit and uncertainty caused by any new way of doing things. After the adoption of new rules, the passion subsides and the changes become acceptable, then familiar, and finally, tradi-

tional. Our presence here is based on the more fundamental and lasting concern, founded on the recognition that procedural rules may have far-reaching substantive implications. The steps of the criminal justice process can affect the result—guilt or innocence. In addressing these amendments, the ABA has focused on their implications. Because of the diverse views within the organization, it is well able to do so.

The process of ABA consideration of rule changes is itself designed to grind fine the materials under review. Every segment of the criminal justice system is represented in the formulation of ABA positions. The proposed Amendments were first carefully studied by a committee which included among its members Federal prosecutors and representatives of the Department of Justice, a United States district court judge, law professors, and lawyers active in the defense of criminal cases in the Federal courts. This Committee prepared an extensive report which was presented to the governing Council of the Criminal Justice Section, which is itself broadly representative of the many different viewpoints encompassed by the Section. It adopted some and rejected others and made a few of its own. I emphasize that the Section's recommendations reflect a balancing of attitudes and are not weighted in favor either of the prosecution or the defense. In turn, the Council's recommendations were debated prior to adoption by the ABA House of Delegates, national representative of the more than 200,000 members of the ABA.

In general, the American Bar Association supports the proposed Amendments except as hereinafter noted and subject to the following suggested changes:

Rule 6(c).—The Grand Jury: Secrecy of Proceedings and Disclosure

The proposed amendment would allow disclosure of grand jury proceedings to a broader range of government personnel than is currently permitted. The proposed definition of "attorneys for the government" is intended, according to the Judicial Conference Advisory Committee Note, "to facilitate an increasing need, on the part of government attorneys, to make use of outside expertise in complex litigation."

While recommending approval of the proposed amendment, the ABA urges that an explicit legislative statement be made that the only purpose of the amendment is to provide the government with the expertise of other governmental personnel, where needed; and that each governmental department or administrative agency has the obligation to insure that the grand jury information disseminated to its experts is not used in violation of any constitutional rights, in unrelated criminal cases, or in any civil proceedings.

ABA members expressed the strong concern that disclosure to a broader group of government personnel might be used as a subterfuge by some agencies to obtain information through the grand jury process which was not legitimately required for the purpose of the pending grand jury investigation. The ABA thus urges that the legitimate aim of the amendment—to provide attorneys with the assistance of experts in cases requiring specialized knowledge—be clarified via a legislative statement. The dissemination of information to serve particularized departmental or agency needs would not be a legitimate aim.

Rule 23.—Trial By Jury or By the Court, (b) Jury of Less Than Twelve

The ABA supports the proposed amendment to Rule 23(b). This provides that parties may stipulate at any time before verdict "that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences." This proposed amendment is viewed as a minor clarification. At the outset of lengthy trials all parties might well agree to such a stipulation.

Rule 23(c).—Trial Without A Jury

Proposed Amendment

Suggested ABA Revision

In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

In a case tried without a jury the court shall make a general finding and shall in addition find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein, unless waived by the parties after the general finding.

The ABA supports the proposed amendment to Rule 23(c)—with the above modified language. The ABA questioned the advisability of the part of the proposed amendment which requires a party to make a motion for special fact finding before the court has made the general finding. Such a request by the defense or prosecution in advance of the court's decision as to the general finding might well indicate a lack of confidence in a favorable outcome of the case—and could, in fact, affect the court's decision as to the general finding. The ABA believes no convincing reason exists for requiring such an advance request. Indeed, in civil litigation, the court is required to make special findings absent any request from the parties. (Rule 52(a), F.R.Civ.P.) At the time the court makes the general finding, it certainly knows its reasons for the action, and can then either orally before a court reporter, or in writing, set forth the facts forming the basis of the decision, unless both parties agree to waive such special findings. The proposed ABA language modification would meet these concerns.

Rule 24.—Trial Jurors, (b) (1) Peremptory Challenges

The proposed amendment to Rule 24(b) (1) was forcefully opposed at every level of ABA consideration, with few expressions of support for this change. The proposed amendment to Rule 24(b) (1) would reduce and equalize the number of peremptory challenges available to defense and prosecution. The number of peremptory challenges would be reduced from 20 to 12 for both sides in capital cases; from 6 for the government and 10 for the defense down to 5 for both sides in felony cases; and from 3 down to 2 peremptory challenges for both sides in misdemeanors.

The ABA strongly opposed the amendment's reduction and equalization of peremptory challenges; this opposition was unanimously expressed by the Section's Council at its November 1976 meeting. The ABA urges retention of the existing number and allocation of peremptory challenges for capital cases, for felony cases, and for misdemeanors, as contained in the current Rule.

The Advisory Committee fails to make a convincing case for the change. It argues that reduction and equalization of peremptory challenges between prosecutor and defense will result in (1) petit juries selected at random from a fair cross-section of the community; and (2) an acceleration in voir dire procedure and a savings in juror costs through the use of smaller jury panels.

There is no basis upon which to conclude that equalizing the number of challenges will serve to increase the likelihood of random selection. In the opinion of many experienced litigators, the proposed amendment will unnecessarily advantage the prosecution, which in most cases has more knowledge about the past behavior of jurors.

As for acceleration of voir dire and reduction in costs through the use of smaller jury panels quite the contrary is as likely to occur. Defense lawyers, stripped of the limited potential of peremptory challenges, may feel compelled to engage in more exhaustive voir dire and to make more challenges for cause. The trial court's disallowance of such challenges may later become the basis for appellate review, adding substantially to the cost of resolving the case.

Rule 24—(b) (2) Relief From Limitations

Proposed Amendment

Suggested ABA Revision

(A) For Cause. For good cause shown, the court may grant such additional challenges as it, in its discretion, believes necessary and proper.

(B) Multiple Defendants. If there is more than one defendant the court may allow the parties additional challenges and permit them to be exercised separately or jointly.

(C) Time For Making Motion. A motion for relief under (b)(2) shall be filed at least 1 week in advance of the first scheduled trial date or within such other time as may be provided by the rules of the district court.

(C) Time For Making Motion. Unless in exceptional circumstances the trial court grants additional time for the making of such a motion, a motion for such additional peremptory challenges shall be filed at least one week in advance of the first scheduled trial date or within such greater time as may be provided by the rules of the district court.

The ABA supports this portion of the rule, except that it urges modification of the language, as set out *supra*. Proposed (b) (2) would give the court discretion to increase the number of peremptory challenges, and spells out the time within which such a motion for relief must be made. The ABA's proposed language modification would meet a need to allow the court flexibility "in exceptional circumstances" to grant a motion for additional challenges, even if the motion is filed less than a week ahead of the first scheduled trial date.

*Rule 40.1.—Removal From State Court,
(a) Time For Filing*

Proposed Amendment

(a) Time For Filing. A petition for removal of a criminal prosecution from a state court to a United States district court shall be filed in the district court for the Federal judicial district in which the State prosecution is pending. Such petition shall be made not later than 10 days after the arraignment in State court except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

Suggested ABA Revision

(a) Time For Filing. A petition for removal of a criminal prosecution from a State court to a United States district court shall be filed in the district court of the Federal judicial district in which the State prosecution is pending. Such petition shall be made not later than 15 days before the first scheduled trial date in State court, but in any event, may be made up to 10 days after the arraignment in State court except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

Proposed Rule 40.1 details the procedure to petition for removal of a criminal prosecution from a State court. It is intended, according to the Advisory Committee Note, "to facilitate the orderly and prompt disposition of a removal petition filed in Federal court and to avoid unnecessary delay in the State proceeding when a removal petition is denied."

The ABA believes the timing provision proposed in (a) to be unrealistic. It supports modified language in 40.1(a), as spelled out above. The parties cannot be expected within 10 days after State court arraignment to make a decision as to whether a basis exists for removal to a Federal court. Further, if such a motion were filed sufficiently in advance of the State court trial proceeding, 15 days is regarded as sufficient, and the Federal court then has ample time to decide whether the case should be removed. The judgment is thereby made without interfering with the State court trial process. The proposed modification of language will meet these deficiencies.

Rule 40.1.—(b) Number of Petitions

Proposed Amendment

(b) Number of Petitions. A petition for removal of a State criminal prosecution to a United States district court must include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitation of this subdivision.

Suggested ABA Revision

(b) Number of Petitions. A petition for removal of a State criminal prosecution to a United States district court must include all grounds known or discoverable with reasonable diligence for such removal. A failure to state such grounds shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not known or discoverable with reasonable diligence at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitation of this subdivision.

Subdivision (b) would mandate inclusion of all existing grounds for removal in a petition for removal, and would allow a second petition only if the grounds stated therein did not exist at the time the original petition was filed, or for other good cause shown. The Advisory Committee Note declares that the purpose of this

proposal is to alleviate "the problem of continual disruption of State court proceedings by successive petitions for removal."

The ABA supports this proposal with modification of language set out above. The ABA believes the rule would properly seek to avoid the disruption of proceedings in the state courts, but nonetheless feels it unrealistic to require that a failure to set forth grounds "which exist at the time of the filing of the petition shall constitute a waiver of such grounds." Under the U.S. Supreme Court language, if grounds exist at the time of the filing which are not known or discoverable with reasonable diligence by defense counsel, that could constitute waiver by the defendant. The ABA therefore recommends a modification of the language to meet the legitimate purpose of avoiding disruptive tactics—while avoiding penalizing the defendant when defense counsel is not aware of the grounds relied upon in a successive petition, after he or she initially has exercised reasonable diligence.

Rule 40.1.—(c) Proceedings

Proposed Rule 40.1(c) is intended, according to the Advisory Committee Note, to "discourage frivolous petitions when the only purpose is to cause delay and to disrupt the state proceeding." The ABA believes, as a result of the time restrictions and waiver provisions provided in (a) and (b), that the removal question will be decided well in advance of the state court trial. Allowing the state court trial to proceed even if a petitioner for removal is pending should have no significant practical consequences, and the ABA supports 40.1(c) as proposed.

Rule 41.—Search and Seizure

*** (c) Issuance and Contents ***

(2) Warrant Upon Oral Testimony.

The proposed Rule 41 amendment would establish a procedure whereby search warrants could be issued over the telephone (or radio or other electronic means) when it is not reasonably practicable to obtain a warrant by presentation of a written affidavit to a magistrate or state judge. Arizona and California currently allow such a practice. According to the Advisory Committee Note, "federal law enforcement officers are not infrequently confronted with situations in which the circumstances are not sufficiently 'exigent' to justify the serious step of conducting a warrantless search of private premises, but yet there exists a significant possibility that critical evidence would be lost in the time it would take to obtain a search warrant by traditional means." The step-by-step procedures for orally obtaining a warrant are spelled out in the proposed amendment.

The ABA supports this proposed amendment. The ABA is persuaded that it is preferable to encourage maximum use of an impartial judicial officer to weigh probable cause before deciding whether a warrant should be issued—rather than to have a law enforcement officer proceed without any warrant, due to a reluctance to take time to obtain a warrant in person, and instead seek to justify his or her action on the grounds of "exigent circumstances."

There are many arguments supporting maximum use of warrants over the telephone. The magistrate can electronically record the conversation so that he or she can accurately prepare a written summary of probable cause at the conclusion of the telephone conversation; this can then be carefully assessed. Actual issuance of the warrant can thereafter occur during a subsequent telephone conversation. The ABA feels that the opportunity to weigh credibility during a personal appearance before a magistrate is overstated. Indeed, in a warrant application via telephone there perhaps exists a greater likelihood that the magistrate will actually discuss probable cause with the investigating officer.

"Although the procedure . . . contemplates resort to technology which did not exist when the Fourth Amendment was adopted," the Advisory Committee Note asserts, "the procedure complies with all of the requirements of the Amendment." The Section supports the proposed amendment.

CONCLUSION

In closing, I would like to advise the Committee that while the ABA has supported the Enabling Act, i.e., that rules and amendments to rules should be promulgated by the Supreme Court and become effective after transmittal to the

Congress, the Criminal Justice Section has urged that the Enabling Act can be effective only if drafts of proposed rules and amendments are circulated widely in advance of their promulgation in sufficient time to allow diversified segments of the bench and the bar an opportunity to comment thereon. No such opportunity was afforded here. In fairness, recently, a proposed new Rule was circulated for discussion and comment in a timely fashion.

On behalf of the American Bar Association, which I am honored to represent before these members of Congress, I want to thank the Committee for providing us with an opportunity to comment on the proposed Amendments and to urge support of the foregoing.

I shall now be pleased to respond to any questions which you may have.

Mr. MANN. Our next witness is John Cleary, executive director of Federal Defenders of San Diego.

TESTIMONY OF JOHN CLEARY, EXECUTIVE DIRECTOR, FEDERAL DEFENDERS OF SAN DIEGO, INC.

Mr. CLEARY. Thank you, Mr. Chairman.

My name is John Cleary. I am with Federal Defenders of San Diego. We are the Federal defender organization under the Criminal Justice Act assigned to represent persons financially unable to employ counsel.

My original experience emanated from Chicago, where I received my first teachings in criminal law both in the State and Federal courts. I have had some experience in San Francisco, and for the last 6 years I have served as the Federal defender in the southern district of California.

The southern district of California has a rather large criminal case load, disproportionately large to our number of judges. We have five judges; we had 136 criminal juries during fiscal year 1976. The district to the north, Los Angeles, had 169 with 14 judges.

The concerns I bring today are not so much on a theoretical plane as they are on the practical level. I would like to give you the viewpoint of the trial lawyer, not my experience personally—some of them are, but collectively those of our office, which I think handles the majority of criminal jury trials in our district.

My comments are solely limited to the amendments proposed to rule 24. Those amendments, if adopted, would make the Federal trial jury selection system, which is extremely sick, sicker.

First of all, I would like to preface this with some advice given to me by many of my judges, in chambers, I have suggested some changes. I would ask, "Please, rule 24 (a) says we have a right as defense counsel to question jurors. We as counsel have a right to talk to jurors to get some idea if they are peers." The judge says, "Don't bother me with that. Denied. Go tell it to Congress."

Well, I know your patience is somewhat strained, getting on into the afternoon, and I don't want to bore you with details. But there are things that have troubled me and many of the lawyers who work in Federal courts, and there really are not very many jury trials that made this Federal system a sick system. California and Illinois could offer us much enlightenment as well as the other States. Similar questions have been raised in State courts which have emulated the Federal court on pressure limiting voir dire techniques, but the courts were overruled by the legislature.

I think many of the proposed rules before you now, coming from the judiciary, manifest an inherent conflict of interest. Let me point that out.

First, under our Constitution we have a right to trial by jury. If you don't want a trial by jury, you take it by a judge. Sometimes in the trade we call that a "slow plea of guilty." The concern we have, though, is that it is an option, and judges don't like to have options other than themselves. So when you opt for a jury, you are saying, "Mr. Judge, you are not appropriate to hear the case." Therefore, the judge wants to maintain his ascendancy, even though, in a theoretical fashion, we say the trier of fact is the jury, but the judge maintains his position of ascendancy.

Second, our concern is the role of counsel. The Sixth Amendment mandates the effective assistance of counsel. In jury selection in a Federal court, you are little more than a court attendant. I often think the bailiff has a more valuable role in calling out the numbers and names. You sit and watch.

The last thing is that jurors are on this plane of equality with the judge, but the judge is the one that determines their impartiality. So are they really? When we talk about impartial jurors, who is the jury impartial to? The judge or the parties? I would like to think it should be the parties.

I would like to point out the historical erosion of peremptory challenges, and I would like to cite an old Supreme Court decision, *United States v. Wood*, 299 U.S. 123 (1936).

It has always been our desire, since the common law days, to expedite. Supermarket justice is not fair justice. You might have the most efficient machinery in the world, but it might not be fair. Jurors are an obstacle at times—difficult to live with. But under our system, we like them. We like the collective entity sometimes, rather than a single entity, deciding these most important issues.

Under the common law, a party had a right of *de medietate linguae*, the right to have one-half of your jury denizens or citizens and the other half aliens. In my district, where we have a lot of illegal aliens charged with dope offenses, I often wonder how does the "Gringo jury" sit there and fairly evaluate them. I only wish that we had *de medietate linguae* in our district so that we could evaluate the culture of these defendants. That right has been abolished, as Chief Justice Hughes pointed out.

But in common law how many peremptory challenges were there, and who were they for? These challenges were for the accused, not for the Government. At common law there were 35. In the reign of Henry VIII the number was reduced to 20. That was in the 1500's, presumably before the adoption of the common law here. Then later Congress in its wisdom cut the number to 10, where we are now. Ten peremptory challenges is referred to in the present rule. The existence in common law left it at 20 for capital cases, where it still remains now. But this is the genesis of the rule, the erosion of the role having been to expedite cases.

In the *Wood* case, the court said very generously that the number of challenges is left to Congress. We know how busy Congress is, and I think Congress is troubled by the high-speed mechanism to get these

proposed amendments to the rules run through. Also the legislative arm should not want to usurp the tender prerogatives of the judiciary. But in *United States v. Wood*, the court says the courts are not concerned with peremptory challenges; that is for Congress to establish. Congress is to establish the mechanisms for fairness for insuring impartial selection of jurors in a Federal criminal trial. So I say in *United States v. Wood* we received a good piece of advice.

Interestingly enough, 2 years ago in *United States v. Hamling*, a case originating out of the southern district dealing with obscenity charges, the Supreme Court referred to jury selection. In one of those, the Court said, "We are not concerned with anything other than systematic, purposeful, or intentional exclusion of age groups." If the selection process eliminates the young, the Court will not take action. Only where there is an intentional exclusion of a group will cause judicial review. It is up to Congress to cover cases of accidental discrimination.

All those who have tried cases, especially in my district, have seen sometimes what I would call fortuitous or accidental discrimination. You enter court with a 21-year-old female client charged with bringing in a hundred pounds of marijuana, and there are only two people under the age of 40 in the prospective venire panel. You begin to wonder if there is some type of cultural gap that you will have a hard time overcoming in presenting this case to the triers of fact.

There is slippage in the Jury Selection Act. The voter registration list is for the birds. You don't get a cross section of the community. The peremptory challenge helps take the edge off some of these discriminations.

The peremptory challenge is a fail-safe mechanism. It must be evaluated as a part of the total selection process. First there is the striking of the whole panel or challenge to the array, which Congress has established in 28 U.S.C. 1867, a motion to dismiss prior to trial. We know that doesn't work. You have to show purposeful, intentional discrimination.

Then we have a challenge for cause. How do you exercise challenges for cause? Do you call someone incompetent? I want to question this person as to their ability to rationally evaluate evidence.

Challenges for cause are most difficult to assess. So what you usually wind up is a peremptory challenge. The peremptory challenge is a device by which you can, in borderline cases, remove certain people whose qualification or impartiality may be questionable.

I would like to give you a synoptic version of a day in court when you select a jury in our district, which is symptomatic of many other districts. Our district is cited as the fastest in the West because we have so many jury trials processed so quickly.

You start out by walking into the court room. Congressman Hyde can testify to the trauma of a State practitioner in a Federal court. You walk in, and you ask, "What do I get?" You get a list of prospective jurors handed to you for the first time. If you are an astute counsel, you can ask for it the night before, if the judge will give it to you. Sometimes they won't. You are not aware of Federal practices.

This brings up a question on the reasoning behind rule 24(b)(2) in the proposed amendments. Why do you need that request 7 days early? Because in the Federal system when the practitioner walks in

and says, "I would like a few extra peremptory challenges, we only get 10." The judge says, "Sorry. You did not make the motion 7 days prior to trial. The motion is denied."

Onward and upward to the 10 peremptories. You have to be there. You say it couldn't possibly be that way in one of our Federal courts. Come visit them sometimes. Don't tell them you are a Congressman, but just come and see how the jury selection is done. It will make your hair stand on end compared to some of the State courts.

And that is the other thing, traumatic shock. When you walk out of a State court where you have a chance to talk to the jurors, you say, "You mean to tell me I can't ask questions?" I read rule 24; it permits counsel to ask questions. That is not the way it is done. You don't get it unless Congress mandates it. It is discretionary with the judge, and he always denies it. That is the way it is; this is real life in our Federal courts.

This ABA representative suggests that the Federal system in the District of Columbia gets juries selected so fast because you don't have those nasty counsel asking dumb questions. I agree, there are abuses of counsel in asking questions, but does that justify the total annihilation of counsel's participation in voir dire selection?

You then have what is called "questioning of the jurors." I will give you two cases.

I was in chambers in a case in which a black woman had allegedly shot her husband in the head. I had at least the advantage of having gone over the jury questionnaires. One white juror had suggested, "I cannot sit fairly in a case of someone other than my own race." In chambers, I moved for a challenge for cause. Denied. I asked the judge, "I would like an opportunity to question the witness as to his statement on the questionnaire." Denied. The court stated he asked the juror, "Can you be fair?" And that the juror said yes, he could be fair. End of inquiry.

Another case was in New York. We had the transcript of the case. It was really funny because certain jurors complained to the judge that one juror couldn't hear. The judge had the juror examined in chambers, and it was obvious she did not understand the testimony. It was almost a joke as to how the juror couldn't even hear what the judge's inquiry was as to her competency.

I am not talking about bias, just basic qualifications. The initial examination was so perfunctory that even the adequate hearing of the juror was not explored.

Often the nature of the inquiry conducted by the judge reminds one of some type of religious revival experience where everybody answers "amen."

"Can you keep the faith? Yes. Can you follow the laws? Yes."

I am telling you, if it wasn't that you were there and it was a real court and it is the way things were conducted, you would think it was very funny.

It is a form of incantation of rhetorical questions that need only one response: "I am fair."

It is ritualistic, not permitting true response.

Counsel for the subcommittee here raised a good question. What about these jury-picking devices or indicators such as Ouija Boards,

race, background, and left-handedness. That is all a lot of hogwash, as any practicing lawyer knows.

People are different in how they look, walk, talk, and ethnic background. You can't make distinctions on these characteristics. What you want to do is hear the person answer a real question.

I have made determinations on jurors under the Federal system, the enlightened Federal system, by how a person walks.

Now, it was not my choice. I would have liked to directly ask the person a question. In fact, the question was finally put to a perspective juror, a very interesting question. I asked the judge to ask the question. My client was an alleged bank robber, a white male. I had asked the judge to ask whether anybody would be prejudiced against him because of his race, religious, or ethnic background. The judge said, "You should be ashamed to ask such a question when there are two nice black ladies sitting on that jury."

I indicated I felt it was an appropriate question, and a Supreme Court decision entitled me to that—there is some doubt today—but that I thought it was a fair area of inquiry. Only because I was adamant on the record, he asked the question. No one then on the panel said they would be prejudiced. This fellow walked up and he sat down. He had heard the question that I forced the judge to ask. The judge said, "Do you have any comment on the questions I have previously asked?" He said, "I hate Jews and white folks."

That man was excluded. The fact was that he got a hard question but he gave an honest answer. He would not be fair to sit in judgment upon this person. We are not allowed the opportunity to explore for latent bias.

That leads me to the next point. I have a prepared list of voir dire questions here, and I don't want to bore you with it. It is a sample motion for written questions. Under the rule if you are denied any personal voir dire you must submit written questions. So the poor State lawyer who walks into Federal court without having prepared them is done in. He is not entitled to specifically request anything asked under the existing rule. In this case I had submitted 30 questions. About six were touched upon. Some dealt with basic qualifications. The overwhelmingly case-decided law is contained in the *Hamling* decision. It is totally within the discretion of the trial judge as to what questions are presented to the prospective jurors.

I asked the question, for example, if the jurors had ever discussed the case with counsel after the trial. It has been my experience that either defense or prosecution may sometimes poison jurors by their post-verdict discussions. That question has never been asked in our district, and I go nowhere with it. I have had cases involving an insanity defense where I proposed questions concerning psychiatric considerations which were never asked. The questions to be propounded by the court lie totally within its discretion the exercise of which is rarely disturbed by the appellate tribunals.

Again, in *Hamling*, an obscenity case, the trial court refused to ask questions as to whether jurors' educational, religious, or political beliefs would affect their evaluation of obscenity. That question was not asked. The failure of the court to ask it was held proper by the court of appeals and the Supreme Court. There is no effective appellate review, because by the time you get to the appellate courts, judges are re-

luctant to cut somebody loose because of some erroneous pretrial procedure in selecting the jury. Often the appellate courts treat such complaints as defense counsel screaming after the fact.

Congress has the responsibility to ensure that there is a fair procedure in jury selection.

In our district we use the Arizona system. The Arizona system originated in Arizona, but it was left to our district to nurture, develop, and create the monster that exists today. The Arizona system is called the "whain-ban" jury selection procedure, which on a protracted basis might extend to 45 minutes. On good days 15 minutes. It really cuts down on that wasted time for voir dire.

The system is initiated with the selection of 32 prospective jurors. The judge then reads the indictment and asks questions. "What is your name? Where do you live? What is your occupation? What is your spouse's occupation? Can you be fair?"

After that, the judge states to defense counsel, "Counsel, take your 10." Counsel for the government takes 6 peremptory challenges. That is it. The first 12 culled out are your jury. It is efficient. You have no questions that you can put orally to the venire. There is a restricted amount of written questions that you can indirectly put to the jury that the judge might ask. And that is your jury. It denigrates the process of jury selection.

I like to think that it is the function of Congress to put on an equal level with the judge the role of a jury. If we have such a summary selection procedure at the total discretion of the trial judge, do you really establish the jury as coordinate factfinder in the trial of the case?

We have also another hangover, a 1894 Supreme Court decision where defense counsel was not allowed to see the peremptory challenges exercised by the government. You might have a case where you think a prospective juror is somewhat senile. They are over 70, and they can't hear too well. And you would like not to blow your peremptory on that individual if the Government has already kicked them off. You don't get to see the Government's exercise in peremptory challenges. This little game is to cut down your use of the peremptories because you will not know if the Government has removed the borderline cause case. If in doubt you must use your peremptory to challenge a questionable juror. That Supreme Court decision has never been overruled. Ironically, in that particular case Arkansas did not permit the State to conceal its exercise of the peremptory challenges. Arkansas, the enlightened jurisdiction, did not permit it. But the Federal Government, with the wisdom of the common law and no comment from Congress, permitted it.

Then we have the "rejecting of the rejects." You have two juries picked in two other courtrooms and the rejects are sent to a third courtroom. Those who are then excluded for cause or peremptory challenges, are sent down to your courtroom for selection. The prospective juror says, "Yes, sir, my close buddies are with the State police." When he said that in the first courtroom he got kicked on a peremptory. He then comes into the third courtroom and knows better what to say. It goes like this:

"I am a mechanic."

"Do you have any law enforcement friends?"

"Some very distant acquaintances."

When it is the same day, you don't get the feedback from the other counsel or have ready access to notes in a jury book.

This is expedition without considerations of fairness.

The California experience, as I mentioned earlier, was the situation where the State court, a rather enlightened Supreme Court, I might add, decided to opt for the expeditious efficient Federal system of no voir dire by counsel.

In *People v. Crowe*, 8 Cal. 3d 815 (1973), the Supreme Court said in the future California courts were going to follow the Federal system and the judge may now exclude totally any role of counsel on voir dire.

The bar, both prosecution and defense, was horrified. They rose up in arms to modify the statute dealing with voir dire.

Where did counsel get the relief? From the courts? No! From the legislature, the Penal Code Section 1078 restores the right of counsel to personally voir dire.

Criminal law practitioners are not limited to one forum or another. They practice in both State and Federal courts. We like to think that the Federal system offers the best of the criminal justice system. It should not be so prosecutorial oriented a system that leaves defendants as well as anyone in the courtroom feeling the parties didn't have their day in court. You want to walk into court and know whether you win, lose, or draw, you have received a fair shake. When our system comes to the point where you are not getting a fair shake, I don't care what your viewpoint is, it is not American. I feel that is the way the system is right now. I would be embarrassed to have foreign lawyers see the jury selection system in the United States.

The common law and the sixth amendment protects the right of the accused to peremptory challenges.

The government apparatus, the court, is the agency that brings the jurors into the system and evaluates and qualifies them initially. This process of evaluation and accreditation of the jury is exercised by the government.

I feel that the peremptory challenges should be disproportionately for the defense. They should be predominantly weighted for the defense to offset the inherent government preselection process and to insure the jury actually selected is "impartial" to the defendant.

The defendant is the one that goes off to jail. An evil of the present system is that defendants feel they didn't get their day in court, and that is one reason why many develop an antagonism toward the system.

The public—witnesses and spectators—become extremely agitated when they see what really occurs in the courtroom. They didn't learn this in their little primers in grammar school about how you select juries. The jury selection process after 1968 with all of these legislative renovations did not eliminate error from the system.

My recommendations are threefold. First, I incorporate the ABA position seeking personal voir dire by counsel. A revision of rule 24 should treat it as a dynamic whole, not piecemeal. You look at rules piecemeal in the proposed amendment process. Now there is no effective role of counsel in selection.

So I am asking that you modify rule 24(a) to include mandatorily, like California, the right of counsel for prosecution and defense to

personally voir dire the jury. I am not speaking as to how much voir dire. It can be 2 or 5 minutes per juror—whatever the judge feels is reasonable. He is the controller of the trial, and I am not trying to undermine his role. I am just saying there should be a role for counsel.

My second suggestion is—and this is somewhat contingent if my first suggestion should not be considered appropriate—is that rule 24(b) be modified so that if counsel is denied voir dire, which is the overwhelming Federal court practice as it is now, 20 peremptory challenges for the defense, the common law number, and 10 for the government. By the way, at an earlier date there were only five for the government, but I will throw in the five in the spirit of generosity on the part of defense. Twenty and ten. If voir dire is allowed, I would respectfully urge this committee to suggest the continuation of the present rule. That is to say, 10 and 6. To suggest what has been proposed to you by the Judicial Conference makes a farce of our Federal court jury system.

The last point I would add is one of my ever popular ones which have been favorably received by the Judicial Conference Rules Committee. This is one I have made over and over again because having been brought up in Illinois and kind of nurtured in that system, I kind of like the way they handle some things. In Illinois they have a motion to substitute judges. When I came to California, I encountered a similar procedure in C.C.P. 170.6.

We are dealing with peremptory challenges to jurors, which we have now caused to be subjected to much scrutiny—the right to take people who walk in off the street for a 6-month duration to sit as judges, if you will, of the factual liability in a criminal case.

Let's direct our attention to some other area: the Federal judge. I am suggesting that there be one peremptory challenge to the Federal judge in a multijudge district. That is a district where there are five or more judges. Let me give you some common experience in the courtroom where I sat next to the defendants. When you are in a district with five judges and one of them is known as the "Hammer of God," your client turns to you and says: "Why me? Why me? Why did I get stuck with this one who, although appointed for life, thinks he is anointed for life." I had personal experience in Chicago with "Julius the Just" Hoffman. Does the system really manifest a sense of fairness when you have to look the defendant in the face? Do you say, "Well, he really is a fair judge." I have a duty to be candid with my client. And I say, "If the judge finds you guilty, he is going to sock it to you." That is the way it is. As a lawyer, you sit there and you label the five judges in your courthouse.

My proposal is that we should have a system where you can substitute out one judge. In fact, what you are doing is giving them feedback to say, maybe, judge, you are the "Hammer of God." This group here sits at the pleasure of the electorate every 2 years. If you get out of hand, you have to answer to a lot of people. I am saying that a judge, if he wants to be fair and impartial, should have some sensitivity to the parties. This peremptory challenge should go only to the defendant in a criminal case because it is the Attorney General who evaluates the qualifications, background, experience, and temperament, if you will, of those who will sit and pass judgment on those

who might oppose the United States in a case involving a Federal criminal offense.

This suggestion is based on my experience in Illinois where the defense may substitute two judges out in criminal cases. In Wisconsin I believe there is a similar rule. In California, we have a statute, C.C.P. 170.6, which is activated by an allegation of prejudice. If in doubt, you have to say the judge is prejudiced, but it is an absolute thing that once you make the allegation, the judge is kicked from the case. The States have this procedure. When many of my brethren from the State courts come into Federal courts, they say: "Don't we have a 170.6 over here?" The answer is, "No." And by the way, our State judges have to run for election every 6 years. Federal judges don't have to run for election.

So I am strongly urging that the committee consider a motion to substitute judges on behalf of the defense or a peremptory challenge to the judge. It is not going to have a great effect on the system, because when another judge gets the case, if you opt out of another judge, that fact might have adverse considerations. Lawyers are not going to exercise this willy-nilly. But when you have a client who feels he has not had his day in court, shouldn't he have that option? That is all I have to say. I hope I didn't bore you. I know it is a long afternoon and I am able to respond to any questions you might have.

Mr. MANN. Ms. Holtzman.

Ms. HOLTZMAN. Mr. Cleary, I want to thank you for your very illuminating testimony. I think you have made your point very well. I am concerned about your criticisms on the challenge for cause. Is it really the thrust of your testimony that the right to challenge for cause is not an effective right because you are not permitted to develop information that would permit a challenge for cause? Is it a fact in some circumstances the judge arbitrarily denies motions?

Mr. CLEARY. I am suggesting both grounds. First, since you have no voir dire, you can't really probe the person as to their basic qualifications as when you could suggest at side bar: "Maybe this person can't hear so well." So you don't get any probing at all.

Second, even though you submit written questions concerning this area, the judges seldom even look into those areas or ask those questions. What you have to show is abuse of discretion on judicial review. So that by foreclosing counsel from voir dire, you don't even get to probe the area.

Now, it is another thing where a judge lets you probe the area, and if the prospective juror had some obvious bias, the judge asking the rhetorical question: "Can you be fair?" would eliminate it. If you are allowed to probe the area, I think some judges might tend to grant the challenge for cause. Where you are not allowed to probe you have the judges making the record to preclude judicial review. The judge will say, "Well, I had a chance to evaluate the demeanor of that witness and he responded very honestly when I said, 'Could you be fair?'" That is it. So you have no effective machinery to challenge for cause. The only tool is voir dire. It doesn't exist.

Ms. HOLTZMAN. Rule 24 says that the court may permit the defendant or his attorney to conduct the examination of prospective jurors. In how many instances do the judges permit the attorney to conduct such examinations?

Mr. CLEARY. For the record, zero.

Ms. HOLTZMAN. I have no further questions.

Mr. MANN. Mr. Hyde.

Mr. HYDE. Thank you. I, too, enjoyed very much your presentation, Mr. Cleary, and I agree totally with you that counsel ought to have some set period of time to interrogate the jury. I don't see anything wrong with 5 minutes per juror, frankly. You are talking about an hour for each side, or 2 hours to pick the jury. The difficulty we have is persuading our colleagues who are not lawyers that we are not just trying to slow up jury trials and trying to provide lawyers with a chance to romance the jury and all of that sort of thing. But in a criminal case, you just can't know the bias of somebody, the prejudice or their intellectual limitations, without talking to them. I have had the experience in Chicago of having a jury picked for you and there it is.

I am sure you have had much more experience along that line. So I would opt for some mandatory time for counsel to interrogate the jury. I think you have got to leave the propriety of the questions within the judgment of the court because there have to be some restraints, as you know. But you can't make a fair judge by rule, unfortunately. I would agree with that.

The change of venue, of course, is so important in Federal court. The peremptory challenge of the judge, as you call it. I can see great resistance to that. There would be the nonability of judges. Even in a multijudge district court such as Chicago you have a couple judges never hearing a criminal case and the others overburdened with them. I wish we could work something out because as you say it is working in the State court system.

What do you think of a special sentencing court? It would "defang" the hanging judge who is going to administer the trial and it would provide a continuity of sentencing, so one judge wouldn't give 6 months and another 6 years. If there were a court that did nothing but sentence them, true, they wouldn't have heard the case, they wouldn't have noticed the demeanor of the witnesses, et cetera, but still it seems to me it would provide a fairer basis in the long run and would obviate the necessity of changing venue from judge to judge. But in a multiple district court you would have three judges who did the sentences. I have often thought that might be an answer to some of the problems. It is not before us.

Mr. CLEARY. It will be before you in rule 35.1. The first point is that in-house review, one district judge versus another, is limited. Each Federal judge is an entity unto himself. They don't like their prerogatives questioned even by this Congress. You find the feeling is: "I am not going to interfere with this judge's ruling."

District courts have tried the sentencing panels, but the ABA standards urge a separate reviewing court. I don't like to see additional appeals. I think that sentence review, just like we have in Illinois, could be integrated with a regular Federal criminal appeal. Also, an appeal may be provided from a denial of a motion to reduce.

The other thing, too, about the time of allowing counsel to make inquiry, if I may respond to that, I believe in the reasonableness of judges. It is just that the case law has told judges they can foreclose any inquiry by counsel. I feel that this Congress should mandate inquiry

subject to reasonable restraints. I don't believe in conditioning jurors. I don't like it. I don't like the use of law questions being asked the jurors other than the difference of proof between civil cases and criminal cases. I want to explore their fitness to serve; that is all. Now, sometimes it is abused. But merely because we have the abuse in some State systems shouldn't preclude any participation.

Mr. HYDE. You would be satisfied with some language that said that counsel for the Government and for the defense shall have a reasonable time to interrogate prospective jurors?

Mr. CLEARY. Yes.

Mr. HYDE. Thank you.

Mr. MANN. Thank you so much.

We appreciate your being here.

Our next witness is Roger Lowenstein, Federal Public Defender for the District of New Jersey.

TESTIMONY OF ROGER LOWENSTEIN, FEDERAL PUBLIC DEFENDER, DISTRICT OF NEW JERSEY

Mr. LOWENSTEIN. Thank you.

I would ask the subcommittee for permission to add to my testimony in the record later.

Mr. MANN. It will be made a part of the record. [See p. 143.]

Mr. LOWENSTEIN. I think as you can see from John Cleary's testimony, we defense attorneys are so often a kind of ornery bunch. It is a thankless job occasionally.

Let me just tell you of some of my background and tell you how I came to be a Federal public defender.

I was a State public-defender for a while in Newark, and then I was in private practice. I then became assistant corporate counsel in the city of Newark and I was a municipal prosecutor for a while.

Now I'm a Federal public defender.

In my career, I must have tried some several hundred cases. It is with a great amount of regret that I come before you today to say that for the first time in my career I have seen innocent people being convicted. There is an irony there because the people who are being convicted are being convicted in Federal court, not in State court.

In my whole career as a State public defender, with all our terrible lack of money and no time to prepare a case and getting the file the same day of trial—I remember 1 week I tried five jury trials. That was in 1 week. I had two juries out deliberating while I was being forced to pick the third jury.

Never once did I feel that an innocent person was convicted. Now, with all the money we have in the Federal system—and I have a staff of tremendously talented lawyers. I have investigators. The judges have a very small backlog compared to the State court.

The pressure is really nowhere near what it was in the State system, and yet I have to say to you today there is much more justice in the State system than there is in the Federal system.

It is a very bitter experience for me, because I feel I am a much better lawyer than I have ever been. I hope I get better with age.

Yet, I have clients who are innocent and are being convicted. I don't mean just clients who have a technical defense that isn't recognized.

There are plenty of those. I mean people who legitimately did not do what they are accused of doing, and in Federal court they are being convicted.

Why is that?

One of the main reasons is the jury selection process.

First, we don't get a fair cross-section of the community. The jury list does not include a cross-section. The voter lists are undemocratic. We have three times as many drivers in New Jersey as we do voters. The motor vehicle lists are three times as democratic in picking juries than the voter lists.

The jury selection, just from the very beginning, excludes young people, minority groups, resident aliens who have a right to sit on juries. It excludes poor people, people who are the peers of my clients. They are not on juries.

The typical jury that I face with an urban, young minority group defendant is a suburban, retired, extremely white male group, the people who have moved out of Newark to get away from my client and people like him.

That is the beginning.

As John mentioned earlier, we don't voir dire. We can't talk to these people. We can't ask them what they think about reasonable doubt.

I think if you took the average person on the street and asked them—"OK, you are now a juror in a Federal case, and the evidence is put in by the Government, and after listening to the evidence you feel that the person is probably guilty, would you convict?"

The answer would be, "Yes, of course I would convict. If they are probably guilty I will convict."

That is not our standard. We have a "beyond a reasonable doubt" standard. But how many lay people really understand that, really understand that "probably guilty" isn't enough?

I am not talking about people who are vicious or venal and who really want to get my defendant. I am sure there are a few people like that. No, I am talking about people who genuinely don't understand the standards that our system sets up so that if a few guilty people have to go free in order to keep innocent people from being convicted, so be it.

The voir dire is supposed to take care of it. We don't have a voir dire. We have people sitting on juries who are in awe of the Federal court. The rooms are gorgeous. They were built in the 1920's. The prosecutor is the Government lawyer. He says, "I represent the United States." That is pretty impressive.

You are in a big room and the judge is the judge and he is way up there somewhere, and there I am way far away from the jury. The defendant sits as far from the jury as is permitted by the geography of the courtroom. The Government attorney is right up there. It is tough.

What annoys me about the whole process is those people who say "well, let's equalize the role of the Government and the defendant. Let's get some symmetry." A criminal trial is anything but symmetrical. This is no Newark cop I have to cross-examine. This is the FBI.

What does the average suburban middle-class juror think of the credibility of an FBI agent even after Watergate? Anything he says has to be the gospel. We have the longest odds possible.

Add to that the whole nature of Federal crimes. A Federal jury trial is very different from a State trial. In the State there is purse-snatching, possession of narcotics, even murder, and there are very simple issues: did he do it; was he there? Something like that.

A typical Federal offense is interstate transportation of bonds moving in interstate commerce, knowing the same to have been unlawfully converted. I don't even know what that means most of the time.

An element of the offense is that my client had to know that these bonds were unlawfully converted and were moving in interstate commerce at a certain point.

You have that kind of issue.

It is very easy to say how innocent people may be guilty. A person who sells stolen bonds to an undercover agent may be guilty of a State offense such as false pretenses, but may not be guilty of a Federal crime. There may be no interstate commerce element.

But how do you convince a jury of that? Well, it is a process of education. How do we go about educating jurors as to what their duty is? What do we mean by reasonable doubt? How do you analyze whether there is interstate commerce?

It is very bad to come into court faced by a jury panel with a built-in pro-Government bias which is in our society all too prevalent.

Again, I don't mean that people are vicious—they are not out there purposefully trying to do a defendant in—but many people have a kind of bias that can only be discovered and overcome by means of an adequate voir dire.

As a result, day after day people like myself and my brother and sister public defenders are having their jobs made harder and harder.

If you take away our peremptory challenges, that is the last straw. I remember talking to another public defender. I said: "I am going to Washington and I am going to testify about the cutting down of the defense peremptory challenges from 10 to 5."

And he laughed. He said: "Where were you 5 years ago when they eliminated the voir dire? Where were you when they set up a jury act which focuses on voter lists? Aren't you a little late? Why don't you just let the last straw hit you and then you can resign and let someone else who isn't quite ornery do the work of being an efficient court functionary? You can let someone else help your client onto that railroad train to jail."

We have a tough job, and if we don't have peremptory challenges, that is the last straw.

I have here a part of a brief that I wrote. I am going to submit it as part of my statement to this committee. It involves a case I tried a few months ago. The charge was conspiracy to import 30,000 automatic weapons from Jordan that were surplus weaponry.

My client was accused of thinking and talking about bringing them into this country. It was a conspiracy charge. No act ever occurred. Guns were the focus of the whole case.

Onto the jury panel walks Mr. Jones—I forget his name, but it is in the transcript.

"Where do you work?"

"Well, I am a guard at the armory."

"Where did you work before that?"

"I was a Jersey City policeman for 4 years."

"What did you do before that?"

"I was a security guard at a missile site."

All of those things were part of the case, guns, police, police witnesses. Missiles were a part of the testimony of the case in chief, and he was a guard at the armory. He is an expert on guns and he is there to keep people from doing what my client is accused of doing.

So, I said to the judge, "Excuse him for cause. This is a cause challenge."

The judge said, "Well, we will talk of that."

"Now, Mr. Jones can you be fair in this case? Can you be really fair?"

"I think so, judge."

"Well," said the judge, "I am afraid I can't excuse him for cause."

I had to use a peremptory challenge. I had a codefendant in the case so I had five peremptory challenges. My codefendant pleaded out of the case after the jury was picked.

I had those five peremptory challenges and they weren't very much, and if you think about it I really only had four. Any good defense attorney after using his peremptory challenges knows he has one more. You look behind you, see this fellow sitting out there. What if I get rid of someone I don't like and I don't have any more peremptory challenges, and some Cro-Magnon might sit down there and I don't have any more peremptory challenges.

So, what you are really talking about here is eliminating six of our 10 down to four. Using that last one is a tough decision. It is going to make it a charade. It is going to make it absolutely impossible.

I have one final thing I want to mention to the committee. It is a book that my employers, the Administrative Office of the U.S. Courts, have published. It is called, "Juror Utilization, U.S. District Courts." Every year they publish it to show how efficiently jurors are being utilized. I looked into it to see what we could learn. In Virginia, the eastern district, 33 percent of all jurors are challenged. It is the highest percentage in the country. The average number of jurors challenged is 15 percent nationwide.

Amazingly enough, their efficiency is better than the national average. Juror utilization is terrific in the eastern district of Virginia. There is no correlation between number of challenges and dollars saved.

Anyone who comes before this committee and says, "We cut down the number of peremptory challenges and it is going to save money," is lying to you, whether intentionally or not. There is no correlation between dollars and challenges.

Just look at the statistics. There is none.

I then looked to see what was the district with the lowest number of challenges in the country. It is the western district of North Carolina, Asheville.

So, I made a few phone calls. I called the clerk in North Carolina. I said, "Why is it that so few jurors are challenged?" My instinct was that this is terrible, no one is being challenged. It sounded like people going through the system without being challenged adequately and maybe this is bad.

The clerk told me: "Well, we believe in the voir dire out here in the western district of North Carolina. Our judges really feel that lawyers should be questioning these jurors, unlike everywhere else in the country. After an extensive voir dire by lawyers and an education of the jurors and it is clear to the attorneys that the juror really understands what his duty is, they don't use so many challenges."

"I said. Well, that is really interesting. You mean that the more voir dire you have the fewer challenges are actually exercised?"

"That is the way it works."

"How long does it take to pick a jury in the western district of North Carolina?"

"A half hour."

One half hour. So that anyone who comes before this committee with some kind of phony efficiency justification for cutting out defense peremptory challenges—it is as phony as a \$3 bill. It is a hidden way of saying that we are so concerned about convicting guilty people that if a few innocent ones have to be convicted as well, so be it.

That is really what is going on here. There is no justification either in time saved, money saved or anything, for cutting down defense peremptory challenges. As it works now, with my 10 and the Government's six, the Government has one and then I use two. Then the Government uses one and I use two. One and two and one and two and then one and one.

So the time saved by cutting down my two to one is nonexistent. We have the same number of rounds. Instead of eliminating one I eliminate two. I say, "Your Honor, I would like juror No. 4 and juror No. 8 excused."

They get up and walk out and two more come in and sit down. So, there is no time saved in cutting my peremptory challenges in half. There is no money saved. There is no court time saved. Why, then, is there this move to cut down defense peremptory challenges? I really don't know the answer other than some kind of symmetry. Let's call the Government and the defense equal in a criminal trial.

Well, we just aren't equal. I wish we were. I wish I had 5,000 FBI agents at my beck and call to help me prepare my cases. I wish I had the benefit of the resources of the prosecutorial arm of the U.S. Government. I wish I had the public opinion behind the defense of a case, the same public opinion that is screaming for law and order at any cost. I wish I had all of that, but I don't. It is not an equal contest in Federal court. It is so unequal that for the first time in my career I can say that innocent people are being convicted. Let's not even worry about sentencing.

What does it mean to have somebody charged with a crime that they didn't do? What does it mean to be told by a jury that, yes, he did it. What is the social cost, not just to that person? It is a mess. I am literally begging you not to do what you are asked by the Justice Department to do. Let us have not only peremptory challenges but some access to that jury so that we can educate them as to what their duty is.

It is not to use Ouija boards or to ingratiate ourselves with the jury to the point where they like the defense attorney, but just so they understand what reasonable doubt is. It is a very difficult concept.

Thank you for hearing me out and thanks particularly for asking the people who are actually trying cases in Federal court to come here as witnesses rather than those who just theorize about it.

Once you are in the pit, as John and I are, it is a far different experience from what the theories say about it.

Thank you.

Mr. MANN. Thank you, Mr. Lowenstein. Mr. Hyde.

Mr. HYDE. I have no questions except to compliment the Federal Public Defender Service for its very able spokesmen and practitioners.

Mr. LOWENSTEIN. Thank you.

Mr. MANN. Ms. Holtzman?

Ms. HOLTZMAN. I echo the previous remarks.

Mr. MANN. Thank you so much, Mr. Lowenstein.

We appreciate your being here.

[The following information was submitted by Mr. Lowenstein for the record:]

FEDERAL PUBLIC DEFENDER,
DISTRICT OF NEW JERSEY,
Newark, N.J., March 2, 1977.

SUBCOMMITTEE ON CRIMINAL JUSTICE,
Committee on the Judiciary, House of Representatives,
Washington, D.C.

TO THE SUBCOMMITTEE MEMBERS: Please accept my appreciation for permitting me to submit this statement and to appear personally regarding the proposed amendment to Rule 24 of the Federal Rules of Criminal Procedure.

The proposed amendment, cutting in half the number of peremptory challenges allowed the defense in a federal criminal case, would further erode the ability of my clients to obtain a fair trial. The proposed amendment is so unwise, in fact, that this Subcommittee should consider strongly an alternate amendment to increase the number of peremptory challenges available to the defense and to return the voir dire of the prospective jurors to the attorneys.

The proposed amendment must be viewed in the context of the entire jury selection process. As I mentioned in my testimony before the Subcommittee, for the first time in my eight year career as a criminal defense attorney I am seeing clients who I believe to be innocently convicted. Despite the far fewer resources available to the state courts, in over one hundred jury trials in the state courts and in my entire experience as public defender and private practitioner in the state courts of New Jersey, I never saw an innocent man convicted. Ironically, in the federal system, with far greater resources and fewer backlogs it is much more difficult to obtain an acquittal. One of the reasons for this is the inability to obtain fair and impartial petit jurors.

We begin with the statute which controls the selection of jurors in the federal system, the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1821 *et seq.* The Act requires that panels be selected at random from a "fair cross-section" of the community and prohibits discrimination based on race, color, religion, sex, national origin, or economic status. As a possible source for the names of prospective veniremen, the Act suggests voter registration lists or lists of actual voters. This suggestion, however, is limited by the *caveat* that such sources must not be used where they failed to comport with the underlying policy of the Act. If use of voter lists only results in the systematic exclusion of some particular group or class of qualified citizens then the Clerk of the Court must supplement the voter registration lists with other lists.

In practice, at least in New Jersey, the exclusive use of voter lists has resulted in some fairly substantial systematic exclusion of groups. Poor persons, members of minority groups, young persons, are all underrepresented on federal juries. There are, for example, three times as many registered motor vehicle operators in New Jersey as there are registered voters. The use of motor vehicle lists would be three times as democratic as the use of voter registration lists, but the Court has not acted to supplement the voter lists.

Far too often I have a young urban client who is a member of a minority group faced with an older, suburban white jury. That does not mean necessarily that such a jury is incapable of being fair to my client. It does mean that in order for that act of fairness to take place, certain procedures must be utilized by the court in order to weed out those prospective jurors who bear some possible bias against the defendant.

This brings us to the second level of screening, the *voir dire*. The *voir dire* of prospective jurors is no longer the province of the attorneys in the case. The Court has taken control of the questioning of each prospective juror and as a result it is more and more difficult to ascertain whether or not there is any bias. As stated by the Supreme Court, "The *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories." *Swain v. Alabama*, 380 U.S. 202 218-219 (1965). In fact, with the judge in control of the *voir dire*, the questioning is far from extensive and probing. Often jurors are questioned as a group as opposed to individual questioning. Often the questioning is leading, and designed to obtain a certain answer. For example, if a prospective juror indicates that he or she has a relative in law enforcement, the judge is likely to follow that response with the question: "That wouldn't affect your ability to sit in this case as a fair juror, would it?" The attorney in such a situation would have followed up the juror's answer indicating a relative in law enforcement with questions such as: "What kinds of discussions have you had with your relative concerning his work? Will you be talking with your relative in the next few days? Open-ended questioning will lead to the revealing to the court and the attorneys who the prospective juror is. Merely asking someone if they can be fair does not help very much.

The third level of screening of prospective jurors is the peremptory challenge. Even if the first two levels, the selection of the master jury lists from voters and the *voir dire* by the court fail to adequately screen the prospective jury, the exercise of a defense peremptory challenge may still allow a defendant to obtain a fair jury. Cutting the number of such peremptories would have a disastrous effect upon the ability of the defense to so select juries and would make a federal trial more a charade than an exercise in justice.

There has been much criticism of grand juries as merely the arm of the prosecutor. If juror selection is to continue in the manner described above and peremptory challenges are to be still further limited, the petit jury as well will be subject to the same criticism.

I have attached to this statement an excerpt from a recent brief in our office. In that case a client of ours was charged with conspiring to import a huge number of weapons which had been stockpiled in Jordan. The subject matter of the trial, therefore, was guns and it was important in jury selection to keep individuals with particularized knowledge of weaponry and law enforcement ties from sitting in judgment on my client. One of the defenses in the case was entrapment by the Bureau of Alcohol, Tobacco & Firearms, the prosecuting agency. A prospective juror was seated who had been a policeman in Jersey City for four years, followed by fourteen years as a site security military police supervisor at a missile site in Livingston, New Jersey, and followed by his present employment as a supervisor of track and wheeled vehicles for the Department of Defense at the Armory in West Orange, New Jersey. A defense request that the juror be excused for cause was denied, since the juror had responded, when asked if his background would make it difficult for him to be fair and impartial, "I don't think it would make it difficult for me." The defense attorney was then forced to use a peremptory challenge which in this case was limited to five, since a codefendant had pled guilty immediately following jury selection.

Whatever the reasons for the proposed cut in peremptory challenges, they have not been made clear to this witness. I have studied the book entitled, *1976 Juror Utilization in the United States District Court*, a publication by the Division of Information Systems of the Administrative Office of the United States Courts. That study examines the use of jurors in each federal district in the United States. One of the items studied is the relationship between the number of jurors challenged and efficiency. Studying these statistics it is clear that there is no efficiency or economic relationship between the number of challenges and the efficient utilization of jurors.

In the Eastern District of Virginia 33% of all jurors are challenged. This is the highest in the country. And yet the efficiency index of juror utilization is lower than the national average, indicating that despite the challenges, the jurors are still being recycled effectively onto other jury panels. One interesting fact:

stands out in examining these statistics. In the Western District of North Carolina there is a percentage of jurors challenged which is the lowest in the country—6.9%. My initial response to those figures was that the attorneys must not be doing their job, or that the judge was not permitting, for some reason, enough challenges. A call to the Clerk of the Court in Asheville, North Carolina, showed that my fears were totally unfounded. In the Western District of North Carolina the attorneys are permitted to individually voir dire the prospective jurors.

Because of the ability of the attorneys, through the voir dire, to educate the prospective jurors as to the issues in the case and to examine each one as to the possibility of prejudice, fewer challenges are deemed necessary. I am informed as well that the selection of juries in the Western District of North Carolina is extremely efficient, and takes approximately one-half hour per case.

It should be pointed out as well that there is no court time saved by decreasing the number of challenges. In New Jersey the exercise of peremptory challenges proceeds as follows: There are four rounds where the prosecution exercises one challenge and the defense two, followed by two rounds where each side has one challenge. Cutting down the number of defense challenges would not shorten the number of rounds, only the number of jurors which the defendant is able to challenge.

Since there is no savings in court time or in efficiency in juror utilization as a result of the proposed cut in peremptory challenges, what then is the justification for such an amendment? It is lame indeed to suggest that there is something to be gained from mere symmetry, since the trial of an alleged criminal in Federal court is far from a symmetrical process. The scales are very heavily weighted in favor of the prosecution and it is only the so-called presumption of innocence which protects the client from being overwhelmed. Cutting down defense challenges can only benefit the prosecution even more. If the amendment is to be passed, it must be passed with the clear message attached to it that it is so important to convict guilty persons in Federal courts that a few innocent ones also convicted must be the price paid. It is only by being clear about the intent and effects of such an amendment that a true national debate on the problem of crime in our country can occur.

Once again, I thank the Committee for its kind attention to my remarks. Sometimes as a defense attorney I feel that I am too often whistling in the wind. I have not felt that way before this Committee, and am much impressed by the legislative process at work.

Respectfully submitted,

ROGER A. LOWENSTEIN.

Attachment.

XII. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR ONE ADDITIONAL PEREMPTORY CHALLENGE, AND THEN REFUSING TO DISCHARGE FOR CAUSE PERSONS WHO BY EMPLOYMENT OR IMMEDIATE RELATION WERE INTIMATELY CONNECTED TO LAW ENFORCEMENT

A. SCOPE AND STANDARD OF REVIEW

The failure of the trial court to grant additional peremptory challenges was an abuse of discretion amounting to a violation of Rule 24, Federal Rules of Procedure.

B. ARGUMENT OF LAW

Prior to the selection of the jury defense counsel requested that each defendant be permitted to have an additional peremptory challenge. The request was denied. (T. 8) The jury panel was in its third week of service. Most of the jurors in the venire for the present case had served on two prior criminal cases during their first two weeks of service, both of which resulted in guilty verdicts in either a conspiracy or a gun possession case. Jurors Nos. 6 and 7 served on those cases. (T. 27) Juror No. 6 was involved in both cases, once as a juror and once as an alternate. (T. 30) During the voir dire, Juror No. 6 indicated that her son is currently a patrolman in the City of Newark, and in his work carries a gun. (T. 36-37) She stated further that her husband is a security guard at Essex County College, in Newark. Juror No. 7 indicated that she has two nephews who are law enforcement officers. One is the Sheriff of Morris County and the other one is a patrolman on the Parsippany-Troy Hills Police Department. (T. 38)

The attorney for the government informed the Court that the case agent sitting

at government counsel table is a close friend of the Sheriff who is a nephew of the juror. Defense counsel asked that Jurors Nos. 6 and 7 be excused for cause. This was denied, since both said that they could be fair and open-minded if picked. (T. 41, 46)

Juror N. 2 was similarly not excused for cause despite his brother-in-law who is a patrolman in Paterson, and his nephew who is a lieutenant in the Paterson Police Department. (T. 64) After the first Juror No. 6 had been excused, new Juror No. 6, Mr. Raphael L. Cole was seated. Mr. Cole informed the Court that he had an extensive background in law enforcement. (T. 66) He had been a patrolman in Jersey City for four years, and was fourteen years as a site security military police supervisor at a missile site in Livingston, New Jersey. (T. 66) Missiles and other heavy armament were mentioned throughout the government's case in chief. (See Argument, *supra*.) When asked if his background would make it difficult for him to be fair and impartial, Mr. Cole responded: "I don't think it would make it difficult for me." (T. 67) After this statement Mr. Cole informed the Court that currently he is a federal employee, supervising track and wheeled vehicles for the Department of Defense 102nd Armed Calvary in West Orange, New Jersey. (T. 68) When asked if that was the Armory, he responded in the affirmative. At side bar defense counsel requested that Juror No. 6 be excused for cause. Counsel pointed out that:

There is no question but that through his police career he has a particularized knowledge of weapons which are going to be a large part of the trial. More particularly, he was employed as a guard at a defense missile site, apparently, and missiles are going to be the subject of discussion as well. (T. 72)

The judge ruled that:

The fact that he may have served as a guard at a missile site in no way implies that he has any more knowledge about missiles than I do.

After the judge denied the excuse for cause of Mr. Cole, defense counsel renewed his request for an additional peremptory challenge. This was denied.

Prior to the exercise of the last defense peremptory challenge, counsel at side bar informed the Court that Juror No. 5, a Mr. Greenberg, was looking over towards the defense table in a plaintive manner. (T. 83) Greenberg had earlier requested the Court to excuse him because an extended trial would work hardship upon him and the Court had reserved judgment. Counsel stated to the Court: "If you are going to excuse Mr. Greenberg I think it would be appropriate to do so now so we can intelligently use the last challenge." (T. 84) The Court refused, and the defense exhausted its peremptory challenges. Ultimately Mr. Greenberg was excused for cause, but after the defense had exhausted all of its challenges, and therefore was unable to challenge the replacement juror.

Two alternate jurors were seated. Alternate No. 1 informed the Court that his son was an investigator for the Immigration and Naturalization Service. Alternate No. 1 was also a former federal grand juror. (T. 88) Alternate No. 2 informed the Court that he had a relative "connected with the Department of Justice." (T. 89) The relative was a friend as well whom the Alternate knew "from the cradle." (T. 90) He also had a friend who works "between here and Washington," as an investigator. (T. 90) He also has "a lot of cousins in the New York Police Department." Once again at side bar defense counsel requested additional peremptory challenges in order to excuse the two alternates, since the judge had indicated that he saw no reason for exercising the challenge for cause. (T. 92) This was denied, and counsel was informed by the Court that:

In England, where we got our system from, the first twelve people drawn are put in the box. There is no voir dire. The defendant, not his counsel, is asked if he knows of any reason why the twelve people in the box can't give him a fair trial. If he says no, the trial begins. It works fine. (T. 93)

Rule 24 of the Federal Rules of Criminal Procedure allows defendants tried jointly to have a total of ten peremptory challenges, but "if there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly." In this case the co-defendant Pinto entered his guilty plea after jury selection, and therefore appellant was limited to five peremptory challenges because of the judge's refusal to exercise the discretion specifically created by Rule 24. By refusing in addition to discharge the jurors with law enforcement ties, the ability of the appellant to choose an impartial panel was severely impaired. As said by Judge Wachtler in *State v. Culhane*, 33 N.Y.2d 90 at 98 (1973):

It is almost always wise for a trial court to err on the side of disqualification. . . . Even if a juror is wrongly but not arbitrarily excused, the worst the

court will have done in most cases is to have replaced one impartial juror with another impartial juror. On the other hand, to deny discharge for cause of an obviously biased juror as was done in this case, does more than prejudice the party against whom the bias runs. It casts a doubt on the legitimacy of the verdict even before the trial begins.

The Sixth Amendment provides that defendants charged with crimes in federal courts "shall enjoy the right to . . . trial, by an impartial jury." But as the Court noted in *United States v. Wood*, 299 U.S. 123, 145-146 (1936):

Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular test and procedure is not chained to any ancient and artificial formula.

A trial court exercises a broad discretion "to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality." *Frazier v. United States*, 335 U.S. 497, 511 (1958). The trial court, while impaneling a jury, "has a serious duty to determine the question of actual bias . . ." *Dennis v. United States*, 339 U.S. 162, 168 (1950). "The *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories." *Sicain v. Alabama*, 380 U.S. 202, 218-219 (1965), cited with approval by this Court in *United States v. Napolcone*, 349 F.2d 350 (3rd Cir. 1965).

The simple fact is that "judicial economy" has taken the *voir dire* away from counsel in federal court, resulting in sparse and unpenetrating questioning. Questions are often addressed to the panel as a whole, rather than to individuals. The trial court in this case, being a devotee of the English system, will not grant a challenge for cause for any reason so long as the juror says he or she would be fair. In this situation the limiting of appellant's peremptories to five, or the failure to grant the requested challenges for cause, is an abuse of discretion. And finally, the refusal to excuse juror Greenberg until after all peremptory challenges were exhausted exacerbated the error. See *United States v. Sams*, 470 F.2d 751 (5th Cir. 1972). Despite the immense body of law to the contrary, why shouldn't the defense be given the benefit of the doubt in these situations? Appellant urges this Court to exercise its supervisory authority in establishing helpful guidelines in this area, and to reverse.

CONCLUSION

For the above reasons, appellant respectfully urges this Court to reverse and remand for a new trial.

Respectfully submitted,

ROGER A. LOWENSTIEN,
Attorney for Appellant.

On the Brief: David A. Ruhuke, Assistant Federal Public Defender. Barry S. Goodman, Linda Zerneck.

Mr. MANN. Our final witness for the day is Mr. Bernard Nussbaum, an attorney in Chicago. He has recently been involved in litigation concerning rule 6(e). Because of this, we are extending him the opportunity to present his views on the proposed amendment to that rule and on any other matters he wishes.

Mr. Nussbaum, we are glad to have you here. We hope that you have enjoyed your 2 days of waiting, which have been with your consent, and we thank you for your patience.

TESTIMONY OF BERNARD J. NUSSBAUM, ESQ., CHICAGO

Mr. NUSSBAUM. Thank you, Mr. Chairman.

I would like to say first that the past 2 days have been impressive. I was counsel for some witnesses in the Bobby Baker investigation, and the atmosphere there was somewhat different than the atmosphere here. I appreciate this opportunity that has been extended to me by invitation very much.

I would like to say that Mr. Epstein, speaking on behalf of the ABA, said quite accurately that once things are promulgated, passions die, interest wanes, and what had been questionable becomes unquestioned.

I think the two witnesses who preceded me gave a fairly good demonstration of how important it is that passions do not die. I am led to start with the end of my prepared remarks, which I wrote out in longhand yesterday before and after other witnesses' testimony, because I think it is important to recognize that sometimes passions do die once rules are promulgated.

James Madison said it very well:

Temporary deviations from fundamental principles are always more, or less dangerous. When the first pretext fails, those who become interested in prolonging the evil will rarely be at a loss for other pretexts. The first precedent, too, familiarises the people to the irregularity, lessens their veneration for those fundamental principles, and makes them a more easy prey to ambition and self interest. Hence it is that abuses of every kind, when once established, have been so often found to perpetuate themselves.

It is in that context that I would like to talk to you about the proposed amendment to rule 6(e), with which I have had some fairly extensive recent experience which has culminated, at least for the present, in the decision of the ninth circuit which you, Mr. Chairman, made a part of the record earlier today.

If I were to propose to you a rule amendment that would permit governmental personnel other than the attorneys for the Government to sit in the grand jury room as observers during a grand jury investigation, you would, I think, say in response that any such provision would plainly violate principles of grand jury secrecy that, as the Supreme Court has stated, are "older than our Nation itself."

And if I were to add that the executive branch maintains that this could be done without any court order whenever a prosecutor felt it would be helpful to have such grand jury guests, you would be quick to reject such a notion.

At the very least, I think we could all agree that any such radical and sweeping proposal could hardly be referred to as what Justice Benjamin Cardozo termed "the piffle paffle of procedure."

I don't make any such proposal and I don't think anybody else would dare to make it.

But it must be somewhat wistfully observed that such a doctrine would have at least one advantage over the amendment that has been proposed. What happens is that these people are not permitted in the room, these so-called assistants. The moment the grand jurors leave however, the IRS agents, for example, come in. Not a witness is told that will happen. Often the grand jurors themselves don't even know it is going to happen.

The agents do not look at just a few documents for which technical advice perhaps is needed. They look at every word that is spoken, every document that has been submitted. That is what happens when access is granted freely and without court supervision to grand jury minutes and documents to people who are said to assist the attorney for the Government in the performance of his duty.

I should add that the proposed rule, which we were told by Professor LaFare does not contemplate any court order in advance or any kind of specific showing of necessity whatsoever in advance of such disclosures, has already been supposedly "misconstrued", accord-

ing to Professor LaFave, by at least two courts; namely, Judge Becker in the *Hawthorne* case—and he said yesterday in certain kinds of cases you must have court orders, particularly in those areas where people given access to grand jury materials are from agencies having general regulatory oversight and investigative possibilities of their own—and, of course, in the *Simplot* case which is in your record.

Who are the “other Government personnel”? The advisory committee tells us that they include, but are not limited to, all employees of administrative agencies and Government departments. No one is left out, not even Members of Congress or the military.

And all this is sought to be accomplished by the simple double-speak expedient—and it is double-speak—of including “other Government personnel” in the term “attorneys for the Government” who therefore are permitted access to grand jury materials historically solely because they are permitted in the grand jury room itself.

I think a remark was made that in some States prosecutors themselves aren’t even permitted to be in the grand jury room. I apologize for not being able to identify the Member who made that remark, but I know it came from the left of me in a southern drawl.

From what I have said, I hope it is apparent that as to rule 6(e) we assuredly are not dealing with procedural piffle paffle. Rather, the issue is deep and it is substantive, not procedural.

The issue posed by the proposed amendment—and that any such proposed rule or statute should answer satisfactorily—is whether, when, to what degree, and pursuant to what conditions grand jury secrecy must give way to the asserted practical need of a Government attorney certified to the grand jury for expert assistance from other Government personnel.

That serious and vexing question simply cannot be answered—as does the advisory committee report—by a blithe observation that “there is often Government personnel assisting the Justice Department in grand jury investigations.” The issue cannot be so obscured. The issue is not whether other Government personnel may assist in a grand jury investigation. The question is whether, when, and how such assistants may be given the secret grand jury proceedings.

There is no rule, and there never has been, depriving the attorneys of the Government of the assistance of others. They can use them in a variety of ways, and they do. The issue is disclosure of grand jury minutes.

Let’s focus on grand jury testimony. The witness doesn’t think it is going anywhere outside of that room unless he, himself, divulges it. Why? Because he is told that everybody in that room is sworn to secrecy except him. Yet he cannot see the transcript of his own testimony afterward. But the IRS agent can.

The threshold consideration is whether such a question should be answered at all by a rule change in isolation from legislative consideration of the entire bundle of strictures imposed by grand jury secrecy considerations. In other words, if Government personnel are to be permitted access to grand jury proceedings to assist the attorneys for the Government, perhaps then witnesses should be given access to the transcripts of at least their own testimony; perhaps counsel for witnesses should be permitted to accompany them into the grand jury room; perhaps an accused should have the same ready access to grand jury materials, and so on.

Now, that accused, after he is indicted, doesn't automatically get the same materials. He can get them in some circumstances under the Jencks Act and so judges let him have a peek at grand jury materials in isolated instances, but there is no rule that says that a defense attorney has access to all materials.

If it is exculpatory, he gets that. If a witness is going to testify at the criminal trial, he gets access to the testimony of that witness. But he does not have access to all grand jury materials.

What I suggest is that to deal with only one aspect of grand jury secrecy without at the same time considering the others at the very least inevitably ignores the careful balances that have been historically struck and which comprise what is called grand jury secrecy.

The danger is that, even other questions aside, the ad hoc consideration of a single proposal tilts the awesome and much criticized scales of grand jury power too far toward the Government and against those who come before it either as witnesses or as potential targets for prosecution. There is some hypocrisy in a process which would allow Government personnel to read secret grand jury testimony while at the same time forbidding access to the very same material by the witness himself in the name of that secrecy.

So, I respectfully suggest that the difficult matters necessarily subsumed within the proposed rule amendment should be considered in the plenary legislative context rather than by rule amendment, particularly by rule amendment which as Mr. Epstein states almost slipped through on the consent calendar.

I work in this area and I just happened to open up Law Week one day and I saw that in 90 days we would have a new law not only with respect to this change but many others.

Professor LaFave thinks there was adequate opportunity for consideration here; he is wrong; there was not. I think Mr. Epstein stated that even the American Bar Association with its vast resources did not have the ability to do it.

There has been no effort by anybody here to try to fine tune these matters. When Professor LaFave, who is a very distinguished professor of law, says that the cases uniformly support what this rule change supposedly does, he is just wrong.

The *Hawthorne* case does not support it and the more recent *Simplot* case does not support it and they are the only two cases other than Judge Becker's earlier *Pflaumer* case that have any kind of extensive discussion or consideration of the issues that are involved in the proposed amendment. Those courts either misread the amendment or they don't like it after extensive consideration and after having the full views of the Department of Justice.

Plenary consideration of other grand jury secrecy aspects was initiated last summer by another Subcommittee of the House Committee on the Judiciary. And at least one bill introduced during the 94th Congress (H.R. 6207, 1st sess., Rangel & Eckhardt) expressly recognized the necessary and appropriate primacy of the legislative—not the rulemaking—function in this important policy area.

Accordingly, and particularly since there has been no demonstration or suggestion of any apparent urgency for the proposed amendment, the subject of disclosure of grand jury proceedings and grand jury secrecy should be considered as a whole together with the other

legislation that has been made, not piecemeal, and, as I have said, in the exercise of the plenary legislative function.

If nonetheless the matter is to be considered in the context of a rule amendment of a single aspect of grand jury secrecy, it is instructive to review a few salient and fundamental items.

I think that none of these have been touched on by previous witnesses, and certainly not by the Department of Justice.

When rule 6(e) was adopted in 1946, it was to continue to insure grand jury secrecy and to make clear that any disclosures of the proceedings, except to those persons permitted to be in the grand jury room itself, must be by court order. The persons permitted in the room are identified in rule 6(d) and do not include other government personnel. Only the Government attorneys, the witness, the stenographer, interpreters when essential, and the grand jurors can be present. All except the witness are sworn to secrecy.

Because the attorneys for the Government as defined in rule 54(c)—which again does not include other Government personnel—are permitted to be present, they also are permitted to review grand jury materials under rule 6(e). The Advisory Committee note to the rule, as adopted in 1946, demonstrates the foregoing. "This rule continues the traditional practice of secrecy on the part of the members of the grand jury except where the court permits a disclosure. * * *"

The view is entirely consistent with a charge typically given to grand jurors which invariably stresses secrecy and also with the typical oath which I was going to take the opportunity to read, but it is set out and I urge you to read it. It is a beautiful oath and the spirit of it has to be measured against the proposed amendment.

Given that history—given that oath—I submit that intrusion on grand jury secrecy by the Government surely cannot be automatically permitted solely on the undocumented belief of a prosecutor that there must be disclosures to assist him in his duties.

It should be noted in this connection that nothing stops other Government personnel from interviewing potential grand jury witnesses before they testify or even talking to them after their testimony if that witness voluntarily consents. That practice is widely followed. For example, the Internal Revenue Manual (part IX, Intelligence 9266.6) provides:

Secrecy of Grand Jury Proceedings and Disclosure.

(1) Following an appearance before a grand jury, each grand jury witness should be interviewed by a special agent in an attempt to obtain the same information which the witness furnished to the grand jury. If the witness cooperates, any question of grand jury secrecy and the Service use of grand jury testimony for both criminal and civil purposes can thus be avoided.

(2) If the witness refuses to respond to the questions asked by the special agent, the United States Attorney should be asked to obtain a court order under Rule 6(e), Federal Rules of Criminal Procedure (18 U.S.C. app.), to authorize the Service use of the grand jury testimony for both criminal and civil purposes. In the event the court declines to sign an order, the Chief should seek the advice of Regional Counsel.

Remarkably, it seems that assistance of Government agencies at times comes with a string attached which broadly hints at some of the implications of any "routine" disclosure policy such as Mr. Thornburgh advocates. Now, the Internal Revenue Manual wasn't available until after the enactment of the Freedom of Information Act. It wasn't until then that people saw what was really going on, despite

all of the directives which Mr. Thornburgh mentioned. That access to the manual came about because of what the Congress did, not because of what the Internal Revenue Service or the Department of Justice did.

That manual provides:

(1) Internal Revenue personnel will be authorized to act as agents of the Federal Grand Jury under the conditions that the U.S. Attorney or the Strike Force attorneys will make application for and secure a Federal Rule of Criminal Procedure 6(e) order that will release all records, information and testimony obtained through the use of the Grand Jury to the Service for civil as well as criminal tax purposes.

And that is the practice today. I suggest to you that it is a shocking practice. It was never legislated.

Yet, despite the history and the plain language of the present rule, the Department insists that the proposed amendment must be construed to leave the matter virtually entirely to the discretion of the attorneys for the Government. In short, the Department perceives a so-called clarification--page 2--giving, again in Mr. Thornburgh's words, the "Department of Justice * * * routine authority to make disclosures to investigative agents and the like."

Essentially, the theory is that such a view is benign rather than frightening because everyone involved is sensitive to grand jury secrecy. So, assertedly, there is no need to worry. Well, perhaps we would do better to put such boundless faith in our institutions and principles rather than in the uniform reliability of Government personnel. That more conservative and traditional view has vivid history to recommend it.

Moreover, it is only fair to ask if we must have unlimited confidence in the discretion of IRS agents, then why, for example, not put the same trust in counsel for witnesses or for an accused. They, too, are subject to the contempt power and much more easily caught, and they, unlike "other Government personnel," are officers of the court.

The temptations encouraged by the proposed amendment, as the Department would have it, are obvious and easily illustrated. Over the past few years, it has become increasingly common to start an administrative investigation and, before it is completed, for the administrative agency to instigate the Department of Justice to request convening of a grand jury to investigate precisely the same matter.

The agency personnel who have worked on the matter are immediately made available to the U.S. attorney to assist him in connection with the grand jury. The U.S. attorney may know nothing about the investigation or even why a grand jury has been convened. I have heard a U.S. attorney say to a court, "I don't know why a grand jury was convened." This is after a battery of subpoenas had gone out drafted by the IRS and enforced by U.S. attorneys.

In effect, the grand jury is made a tool of the administrative agency as a method to continue the administrative investigation to pursue both its criminal and civil investigatory objectives.

The precise effect of this practice is itself hidden by the veil of grand jury secrecy. However, the patent problem has prompted extended judicial and scholarly inquiry into the propriety and ramifications of these developments. Both courts and commentators have expressed grave concern as to the effects of this trend upon fundamental liberties.

The advantage to the Government of such administrative agency grand jury referrals is significant. Simply by convening the grand jury there can be an end run of careful protections fashioned by the Congress that must be observed during the criminal and civil administrative investigations, including presence of counsel, considerations of relevance, right to a transcript of your own testimony, and the like. Only last year, in the Tax Reform Act, Congress expanded these protections in the tax area.

However, the proposed amendment, as read by the Government, makes it readily possible and terribly tempting to utilize the grand jury to avoid such legislative sanctions.

Moreover, the Government can insult both the course of the grand jury investigation and the extent of the information learned by waving the flag of secrecy, even though secrecy has become a one-way street.

A serious question may be raised as to whether, when an administrative agency has its own compulsory process power with the testimony and documents gathered thereby being fully usable either in criminal or civil proceedings, including in a grand jury, it is ever necessary to show secret grand jury materials to such agency personnel to obtain their assistance. Surely, when such an agency—like the IRS—chooses to go the grand jury route to investigate, it is wrong to give the agency all the powers of the grand jury process, thereby avoiding the protections Congress has fashioned regarding the agency's own investigation, and at the same time to permit disclosure of grand jury materials to agency personnel who are "assisting" the attorneys for the Government.

If the amendment is adopted and construed as the Department would have it—in other words, no hearing and court order requirements—administrative agencies will tend to dominate grand jury proceedings even more than they do now. It is a dangerous trend and it should be stopped.

Yesterday, Mr. Thornburgh, in his oral presentation, stated in response to a question that there is "no fuzzing of the edges" between grand jury and administrative tax investigations because both the Justice Department and IRS supposedly are highly "sensitive" to the need for grand jury secrecy. Judge Becker in his *Hawthorne* opinion has commented that the IRS has no such sensitivity.

There are no edges to fuzz. Typically, the IRS, for example, initiates an administrative investigation and then, for reasons best known to itself, switches the investigation to a grand jury with Department approval. The very same IRS agents who conducted the administrative investigation are then detailed to "assist" the U.S. attorney.

When does it do it?—in a variety of circumstances. One is called the recalcitrant witness rule. If they don't like the witness or the way he is answering questions, he is a recalcitrant witness and he is subpoenaed to the grand jury and the Government attorney makes his individual testimony available to the IRS agents. And the administrative investigation process continues.

Ultimately, these same agents made recommendations regarding the case both to the Department and for agency purposes. They could not, even if they tried, disregard that which they have learned while "assisting" the attorneys for the Government. Clearly, disclosure of grand jury materials to such personnel does not "fuzz" the boundaries be-

tween the grand jury and the administrative process; it destroys those boundaries entirely.

How, really, can a representative of the Department of Justice say there is no fuzzing of the edges when in the typical case the IRS agents assist the Government in connection with the grand jury and then go back to their administrative functions in the same case? That is the reason there are no edges to fuzz.

Further, Mr. Thornburgh stated that the assisting government personnel to whom disclosures are made could and would be brought before the grand jury to "explain" their "findings" based on the revealed testimony and documents. Thus, the assisting personnel avowedly would play a prosecutorial role (although in witness guise) before the grand jury to "explain" their "findings" based on the reply of other witnesses. That is something the U.S. attorney would not do and could not do himself under oath.

Yet, the settled law is that one witness is forbidden to be present in the grand jury room itself for the purpose of later commenting on another witness' testimony. Every case dealing with that subject goes the same way. It is sometimes extremely useful, obviously, to have an expert witness sit and listen to a lay witness' testimony and then to testify and say that what the lay witness said means thus and so. That is forbidden. It has always been forbidden. Indictments are dismissed when that happens.

Now, how in the world can you justify, particularly without advance court supervision, giving such a witness the testimony in transcript form and then calling him in and swearing him? It is, I think, somewhat inconsistent and does something that Thurman Arnold called the establishment of a subrosa institution.

What we get is a grand jury where everybody is told a secret and, in fact, it is not. Yet have an institution that is not authorized, that perhaps is not constitutional, but yet functions.

In addition, it should be remembered that the recipient of the disclosures may later testify at the criminal trial. This is a severe problem. If so, that testimony inevitably will be shaped to take account of what has been learned from the disclosed grand jury materials. Effective cross-examination as to such subjective, and perhaps even unconscious influences, is exceedingly difficult at best.

It does no discredit to the attorneys for the government, to suggest that if there is to be an amendment it cannot be construed to permit them to make the determination of the necessity for disclosure. There simply must be court orders; there must be hearings unless judicially excused in a specific instance for good cause shown; there must be a showing—as Judge Becker said in a footnote in his *Hawthorne* opinion and I think as appears in the *Simplot* case—of particularized and compelling need of the most limited possible disclosure to the minimum possible number of identified personnel, and all use of the disclosed materials other than to assist the grand jury must be barred. It must, moreover, clearly be shown that the Department of Justice itself does not have its own resources to undertake or comprehend the task at hand.

You know, it is very rare, if it ever happens, that in criminal antitrust investigations the Department of Justice—and they are very complex and very lengthy and involve millions of documents—

asks to have the FTC assist the grand jury. They use people from the Antitrust Division of the Department of Justice.

The Department, if you want to go to taxes, has a Tax Division with many lawyers and many accountants. And it has always been sort of a puzzlement to me as to how—and the attorney that is running the grand jury generally comes from Washington in any kind of complicated investigation, not from the northern district of Illinois or from the central district of California, but from Washington, from the Tax Division—the Tax Division's resources are inadequate to understand and analyze what is happening.

I think it is dangerous to encourage a giving up of the role of the U.S. attorney in terms of analysis of evidence, in terms of examination of documents. Lawyers have to look at documents. I have to look at documents. I investigate cases, having no recourse to any of the materials that the Government personnel has and I can still do a pretty fair country job from time to time, not always. But the necessity aspect—and the word is in there, but it is meaningless without requiring a hearing and court order. You know the kind of affidavits U.S. attorneys are putting in now when they do it?

The affidavit reads as follows—it is one sentence—"I want permission to show these materials to whoever I designate"—any number of people, but all materials—"whom I think are necessary."

In other words, the affidavit simply repeats the proposition. And some judges rubberstamp those requests. Indeed, in some jurisdictions—the northern district of Illinois happens to be one—we used to have, although I am not sure we do have right this minute because a fuss was raised about it about 3 or 4 months ago—a standing order that provides that with respect to a grand jury sitting, any government personnel that the U.S. attorney thinks are necessary to assist them, can look at anything they want. And that is why there must be specific limitations on what the disclosures are.

The court order and hearing requirements are particularly important when, as Judge Becker suggests in his *Hawthorne* opinion, the Government personnel come from agencies like the IRS and the SEC having investigative, regulatory, and oversight responsibilities.

Otherwise, disclosures indeed will become the "routine" and without any meaningful court supervision. I respectfully stress that the concerns I have mentioned are not solved simply by imposing an aegis requirement that merely betokens recordkeeping and restricting the physical location where grand jury materials are kept. Even if administrative personnel fully comprehend and live up to such requirements, the secret information imbedded in the minds of these "other nameless Government personnel" can never be erased.

In short, the ramifications implicit in the proposed—and I have to say I think somewhat poorly drafted change and poorly considered by the advisory committee, and particularly as construed by the Department—are many and difficult. The problems are masked by the one-sentence seeming simplicity of the provision and passed over in the advisory committee notes.

Grand jury secrecy, which started out as a protection for the citizen, and then turned into a weapon for the Government, is something which if it is going to be modified at all in this point in time, in my view at least, should be changed to make sure that in our complex society

where almost any act if done with bad intent becomes a crime, the potential accused and the Government benefit, and are perhaps hurt, approximately to the same extent by grand jury secrecy. I do not have confidence in the unlimited integrity of IRS agents or of FBI agents any more than I do in the unlimited integrity of anyone. Particularly in the highly charged atmosphere of grand jury investigations and the criminal context the concept that there should be no advance court approval of grand jury disclosures to them is anathema.

Thank you very much.

Mr. MANN. Thank you, Mr. Nussbaum.

Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Just to make sure I understand your position, would you in all cases exclude from the automatic hearing requirement things like a routine handwriting examination?

Mr. NUSSBAUM. I think the hearing requirement, Ms. Holtzman, can vary. When all the Government wants to do is to look at some handwriting, I think a very simple affidavit handed to a judge would suffice. I don't have much trouble with that for the reason that there are no fifth amendment considerations, for example.

In other words, a policeman can take a handwriting sample. You can be compelled to give a handwriting sample. You can be compelled even to have a blood test. So those are very simple situations, which I think, can be handled very simply.

Ms. HOLTZMAN. In that case, would you require that the affidavit specifically identify the documents to be examined by the outside expert?

Mr. NUSSBAUM. Yes. I think that the specific documents are important. They always know that in advance.

First of all, they don't very often do it in quite that way. What they are looking after in documents are generally two things. First is the signature. Then they have to look at the document. Very often and more importantly, they take a little punch and they punch out a little dot and they send it in and it gets analyzed and certain inks of certain chemical compositions and you can do a great deal with that kind of test.

What they typically do in the grand jury room is they will have a witness—and I think Mr. Gudger probably is aware of this—write down about five—sign his name five times—go through the alphabet in both script and printing, both in capitals and lower case also, and all the numbers up to sometimes three digits and sometimes only two. It is that piece of paper that is taken in and is analyzed in terms of handwriting and then compared with another.

The ink test is made, of course, on the original document itself.

But yes, they should be identified. There is no reason not to identify them. That is a very simple listing. Those documents are picked out in advance by the Government attorneys.

Ms. HOLTZMAN. So, in other words, you would require an affidavit in every circumstance where the U.S. attorney wants to use a handwriting expert or an ink test expert?

Mr. NUSSBAUM. Yes. I think the order would issue very readily.

Ms. HOLTZMAN. And you would also require that application be made and a hearing be held where outside experts were called in for other kinds of services?

Mr. NUSSBAUM. I would say yes.

Now, the nature of the hearing, the extent of it, has to be left, it seems to me, in the discretion of the district court. But the witness whose testimony is going to be shown to outsiders should be notified of the fact that it is going on and so should the target of the investigation if known—and very often he is known. In fact, he is told, “You are a target of the grand jury investigation.”

So there are potential adversaries who have very great interests in mind.

Ms. HOLTZMAN. If an order permitting access is issued in such a case, would it be your opinion that the order ought to say who would have access, where the material is to be kept and whether an oath of secrecy is to be imposed on these people and the like?

Mr. NUSSBAUM. Absolutely. I think that is critical. What happened in the case ninth circuit had to deal with was not untypical. Otherwise, you are going to have wholesale disclosures to really literally a limitless number of people. Can you imagine saying that there is not fuzzing of the edges when the documents and the testimony are to be made available to everybody in the IRS? Not just a single person, but all levels of the IRS, up to regional counsel. He is in San Francisco. The investigation is in Boise, Idaho.

I think that identification matter is essential. I think that is something that Judge Becker—I don’t agree with everything that he said and I have met with him on the subject and, of course, he has been very thoughtful about it, as you all know—but he is an absolute bear on that, that you must have very specific restrictions in the order because unless they are specific there are no restrictions at all. Unless prosecutors are forced to say that you can’t just have carte blanche, that you have got to tell us who and which materials and which witness’ testimony—it becomes impossible for a court to make any kind of determination of necessity.

Indeed, I am going to suggest to you right now that if you are going to give the Department of Justice what they really want, why not strike out the word “necessity,” because they are really saying to you that there is no practical way that you are ever going to test it.

Who in the world is going to challenge it?

Let’s take a guy like myself. As far as I know, I am not guilty of any crime today, but I might be the target of a grand jury investigation, although it would be badly founded. And then the grand jury does not return a true bill. Am I going to vindicate that right? Am I going to challenge that my right to grand jury secrecy was abused?

All I want is for that damned thing to be over with. And what about the witness? A lot of witnesses called in front of the grand jury are on the edges of being targets. They are involved almost by definition with the accused in some way. What witness is after the fact, after there is either a conviction or a trial or whatever, going to take on the Government of the United States and what judge of his own motion is going to invoke the contempt power? Who is going to try to hold the Government in contempt?

Only one person and that is a convicted accused, who is probably the person that you are least interested in in some ways, and then it is after he has been convicted and he doesn't have too much of a shot at contempt.

The idea that a contempt sanction serves any function is nonsense. It is similar to a question one of the members asked yesterday. How do you prove bad faith after the fact? How?

There is another thing with the contempt remedy that is wrong. In my view, at least, the burden on showing why there should be breaches of grand jury secrecy should be on the person wanting to accomplish that breach. The minute you get into the contempt area or into the bad faith area, the entire burden—and here I have got to talk a little bit like a trial lawyer again—not only the burden of proof, but more importantly, the burden of going forward with the proof is put on the party charging that the breach was not justified.

First, the proof is entirely in the hands of others and the burden is on the party making the challenge. Unless the machinery for making the examination exists automatically and in advance of disclosure, it is not there at all in any practical way.

The same thing is true, of course, in motions to suppress evidence. I think those of you who were trial lawyers know what happens to motions to suppress evidence and how impatient the judge is during a trial with those kinds of motions. The idea that they will give you a full hearing and that you will be able to prove what you think happened is extremely unlikely.

So, Ms. Holtzman, specificity of showing and specificity of orders is essential. The length of any hearing, whether witnesses are heard or not heard in a particular situation, that is something which at least up front I would say, has to be left to the discretion of the district judges.

I think both the *Hawthorne* case and the *Simplot* case stand for that proposition. But you know my real answer to your question—and I feel this very deeply—is that I don't like rule changes that are called procedural. I don't mind rule changes that deal with 10 or 15 days' notice. But this rule changes policy. When there are other policies affected in the grand jury secrecy context, why can't they be taken up together, particularly when you have already got them in front of you? There is no urgency to this change.

Nor, might I say, does it affect the situation that I was involved in one way or the other because that grand jury happens to be terminating in about 3 weeks, so I am not talking here from a selfish motive. But I have seen this in action and I think it is very dangerous. I get a little bit troubled when I see the FBI building. I don't really have a bias against police. There are wonderful policemen and most FBI agents are wonderful. But the FBI building has now gotten bigger than the Justice Department. That bothered me. I was down there the other day and I saw these two buildings across the street from each other and that J. Edgar Hoover Building is pretty big. The idea that there should be unfettered and untrammelled and uncourt-supervised access by the entire Federal bureaucracy to grand jury testimony and documents is, I think, very hard to justify.

Ms. HOLTZMAN. Thank you.

Mr. MANN. Mr. Hyde?

Mr. HYDE. I have no questions except that once more the caliber of the Illinois Bar has been vindicated.

Thank you, Mr. Nussbaum.

Mr. NUSSBAUM. I appreciate that.

Mr. MANN. Mr. Gudger.

Mr. GUDGER. Let me ask one question. Going back to rule 6(e) as it now stands, and reading the text of the rule, it is now permitted that recorded testimony may be reviewed "Only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court upon request of defendants on the showing that," and so forth. This is subject to a broad interpretation or a narrow interpretation. To one reading this section for the first time, confronting this problem of secrecy for the first time, the inclination is to read the first clause as prohibiting release of information except to the district attorney in connection with the prosecution itself.

To permit that release only in matters dealing with perjury indictments arising out of perjury before the grand jury or contempt proceedings arising out of contempt before the grand jury are matters involving what transpired before the grand jury itself.

Now, of course, with *Hawthorne* and other cases we are extending this doctrine. You are saying that we ought to extend it just in a highly limited degree and only with very careful judicial restraint.

Mr. NUSSBAUM. That is my position.

I would like to make one comment on something Ms. Holtzman said the other day. There are two sentences in rule 6(e). There is the first sentence and then the second one that says in connection with a judicial proceeding, which, of course, by its terms can't be the grand jury itself. That is fairly clear. The case law is very clearly, as one of the other witnesses testified, that when you are dealing with this, whoever wants to disclose those proceedings, whether it is a private litigant or the Government itself, they must make a particularized and compelling showing of good cause. They wind up at best with a very limited order and it is very often denied.

But, on the other hand, the amendment proposed by the Department and the Judicial Conference in connection with the grand jury itself, they say, shall provide no court supervision whatever. That is quite a difference.

Mr. GUDGER. One other question of philosophy, Mr. Chairman. I don't think this has been broached yet.

The very guarantee of grand jury protection contemplated that there would be a body of 18 men who could stay the hand of the governing authority and could do so without restraint from any source. Would you agree with that?

Mr. NUSSBAUM. Yes; I think that—yes, I would agree with that. I think that is not necessarily what is going on now.

Mr. GUDGER. I understand.

What I am saying is this. I happen to be from that State that you made reference to that doesn't even allow the district attorney to go into the grand jury room. It does not permit this for the very reason that it feels that total secrecy is necessary to retain that authority in that 18-member body to act without any constraints from any source, including the governing body of that particular State, with the thought that when its attorney goes into those proceedings, he carries

with him the power of the State into the very body that was designed to restrain the power of the State.

Do you follow me?

Mr. NUSSBAUM. Yes, sir.

Mr. GUDGER. All right.

Now, we have moved beyond that to the present rule.

You are saying that the judiciary should be able to allow or authorize the release of this information. We have already said the district attorney can go in there, but that it should not be written that anyone else can gain access to this except under total judicial control.

Mr. NUSSBAUM. That is correct. I would not go further than that. I would not have gone that far at one point in time, but there is something to the point that justifiable investigation by grand juries is becoming increasingly complex. There are times, although not nearly as often as outside assistance is actually used, when a particularized and compelling showing standard could be met.

But that is the way I would construe necessity—particularized and compelling showing of good cause, with an opportunity for somebody to state the other view.

Mr. MANN. Thank you very much, Mr. Nussbaum. We appreciate your being here.

STATEMENT OF BERNARD J. NUSSBAUM, ATTORNEY, CHICAGO

Mr. Chairman and members of the subcommittee, I am grateful to have been invited to appear before you in connection with your consideration of the proposed amendment to Rule 6(e) of the Federal Rules of Criminal Procedure. I believe the staff has already given you background information concerning me.

If I proposed a Rule amendment that would permit government personnel other than the attorneys for the Government to sit in the Grand Jury room during a Grand Jury investigation, you would, I think, say in response that any such provision would grossly violate principles of Grand Jury secrecy that, as the Supreme Court has stated, are "older than our Nation itself."¹

And if I were to insist that this could be done without any court order whenever a prosecutor felt it helpful to have such Grand Jury guests, you would vigorously reject such a notion.

At the very least, any such radical proposals could hardly be referred to as what Justice Benjamin Cardozo termed "the piffle-paffle of procedure."²

Rather, any such suggestions would have deep substantive implications going to the very nature of the Grand Jury as an historic and a constitutional institution. Furthermore, I doubt whether your concern would be allayed by claims that such sweeping proposals are justified in order to assist the attorneys for the Government in performing their duties.

Of course, I make no such proposal and neither could anyone else.³

But it must be somewhat wistfully observed that such a doctrine would have at least one advantage over the amendment that has been proffered. It would be forthright in changing the institution, however radically. The proposed amendment, as construed by the Government, lacks even that. Under the proposed amendment to Rule 6(e)—as read and urged on you by the Department of Justice—the basic change in the Grand Jury is worked to be sure. The change is just not phrased so candidly.

The proposed amendment would not let such government personnel in the Grand Jury room while the Grand Jurors are physically present. But, according to the Department, as soon as they leave the room, every document presented and

¹ *Pittsburgh Plate Glass v. United States*, 360 U.S. 395, 399 (1959).

² Cardozo, *Our Lady of the Common Law*, 13 St. John's L.Rev. 231, 241, (1939), reprinted in *Selected Writings of Benjamin Nathan Cardozo*, (Hall ed. 1947).

³ Indeed, in response to a question from Rep. Holtzman, Judge Becker specifically stated his opposition to any such proposal, characterizing it as "highly undesirable."

every word spoken would be available for the examination of any and all government personnel whom the attorney believes to be necessary to help him do his job.³ Indeed, the Department maintains—although at least two courts think otherwise⁴—that the very purpose of the amendment is to permit this without court order. Much less one that can be obtained only after an adversary hearing.⁵ That was the position expressed by the Department last summer to another subcommittee of the Judiciary Committee⁶ and it was the position stated yesterday.⁷ Supposedly, this is a procedural change merely “to facilitate an increasing need, on the part of government attorneys to make use of outside expertise in complex litigation.”⁸ We are told that the “government personnel” contemplated by the phrase “includes, but is not limited to, [all] employees of administrative agencies and government departments.”⁹ No one is left out.

All this is sought to be accomplished by the simple double-speak expedient of including in the term “attorneys for the Government”—who themselves are permitted access to Grand Jury materials solely because under Rule 6(d) they are allowed in the Grand Jury room itself¹⁰—“such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.”

From what I have said, I hope it is apparent that as to Rule 6(e) we assuredly are not dealing with procedural piffle-paffle. Rather, the issue is deep and it is substantive, not procedural.

The issue posed by the proposed amendment—and that any such proposed Rule or statute should answer satisfactorily—is whether, when, to what degree, and pursuant to what conditions Grand Jury secrecy must give way to the asserted practical need of a government attorney certified to the Grand Jury for expert assistance from other government personnel.

³ Statement of Richard L. Thornburgh, Acting Deputy Attorney General, before the Subcommittee on Criminal Justice, Committee on the Judiciary, United States House of Representatives, Concerning Pending Amendments to the Federal Rules of Criminal Procedure, at 2, 5 (February 23, 1977) [hereinafter cited as *Thornburgh Statement*].

⁴ The Ninth Circuit held, in *In Re Grand Jury*, 77-1 U.S. Tax Cas. (CCH), ¶9146, at 86, 198 (9th Cir. 1976), that “agency assistance to the prosecutor or the grand jury should never be allowed except upon an adversary hearing resulting in a finding that the assistance is necessary.”

It then added: “The requirement for a showing of need would remain under the pending amendments to Rule 6(e) which expand ‘attorneys for the government’ to include ‘such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.’ 44 U.S.L.W. 4349 (emphasis added). Because of the United States Attorney’s involvement in the prosecution of the case, he or she cannot be entrusted with passing on the necessity of assistance. Cf. *Coolidge v. New Hampshire* (1971) 403 U.S. 443.” *Id.* n. 15.

In the leading district court opinion on Rule 6(e), Judge Becker held that “the Justice Department should be required to make a strict showing of necessity before any request for the interpretive assistance of the administrative agencies is granted.” *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 408 F. Supp. 1098, 1125 n. 49 (E.D. Pa. 1975). He then considered the proposed amendment: “The question arises whether 6(e) orders should be applied for whenever technical agency assistance is to be utilized. If Rule 6(e) were amended as proposed in January 1973 . . . then Rule 6(e) orders might be unnecessary. Such orders, however, provide the occasion for adopting and enforcing the kinds of safeguards proposed here and in Pflaumer, and 6(e) orders should thus have continued value even under an amended rule. We believe that 6(e) orders should be applied for whenever the technical assistance of the I.R.S. or a similarly situated agency outside of the Justice Department (e.g. the SEC) is to be utilized in connection with a grand jury investigation, with the exception of cases where the assistance is of minor proportions or the single instance variety (e.g., utilization of Postal Service or Secret Service expertise in obtaining and evaluating handwriting exemplars or other identification material).”

Id. at 1126 (footnote omitted).

⁵ *Thornburgh Statement*, at 2, 5.

⁶ Statement of Hon. Edward H. Levi, Attorney General of the United States, before the House Judiciary Committee, Subcommittee on Immigration, Citizenship and International Law, on Grand Jury Reform, at 8 (June 10, 1976).

⁷ *Thornburgh Statement*, at 2, 5. Since, even before adoption, at least two courts differ with the Department as to the effect of the proposed amendment, it is manifest that the amendment is badly drafted. Compare the Department’s view with those quoted in note (4) *supra*.

⁸ Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Proposed Amendments to the Federal Rules of Criminal Procedure*, Rule 6, Advisory Committee Note, at 2 (1973) [hereinafter cited as *Advisory Committee Note*].

⁹ *Id.*

¹⁰ The Advisory Committee Note to the original Rule 6(e) stated: “This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure. Government attorneys are entitled to disclosure of grand jury proceedings, other than the deliberations and the votes of the jurors, *inasmuch as they may be present in the grand jury room during the presentation of evidence*. The rule continues this practice.” 4 F.R.D. 405, 409 (citations omitted, emphasis added).

That serious and vexing question simply cannot be answered—as does the Advisory Committee Note—by blithely observing that “there is often government personnel assisting the Justice Department in Grand Jury investigations.”¹¹ The issue cannot be so conveniently obscured. The issue is not whether other government personnel may assist in a Grand Jury investigation. The question is whether, when, and how any such assistants may be given the secret Grand Jury proceedings.

The threshold consideration is whether such a question should be answered at all by Rule change in isolation from legislative consideration of the entire bundle of strictures imposed by Grand Jury secrecy considerations.¹² In other words, if government personnel are to be permitted access to Grand Jury proceedings to assist the attorneys for Government, perhaps then witnesses should be given access to the transcripts of at least their own testimony; perhaps counsel for witnesses should be permitted to accompany them into the Grand Jury room; perhaps an accused should have the same ready access to Grand Jury materials, and so on.

To deal with only one aspect of Grand Jury secrecy without at the same time considering the others at the very least inevitably ignores the balances that have been historically struck and which comprise what is called Grand Jury secrecy.

There is danger that, even other questions aside, *ad hoc* consideration of a single proposal tilts the awesome and much criticized scales of Grand Jury power too far towards the Government and against those who come before it either as witnesses or as potential targets for prosecution. There is some hypocrisy in a process which would allow government personnel to read secret Grand Jury testimony while at the same time forbidding access to the very same material by the witness himself in the name of that secrecy.

So, I respectfully suggest that the difficult matters necessarily subsumed within the proposed Rule amendment should be considered in the plenary legislative context rather than by Rule amendment. That legislative consideration should come together with other proposals for Grand Jury change.

Indeed, just such consideration of other Grand Jury secrecy aspects was initiated last summer by another Subcommittee of the House Committee on the Judiciary. And at least one bill introduced during the 94th Congress¹³ expressly recognized the necessary and appropriate primacy of the legislative—not the rule-making—function in this important policy area.¹⁴

Accordingly, and particularly since there has been no demonstration or suggestion of any urgency for the proposed amendment, the subject of disclosure of Grand Jury proceedings and Grand Jury secrecy should not be considered piecemeal, but as a whole in plenary legislation.

If nonetheless the matter is to be considered in the context of a Rule amendment of a single aspect of Grand Jury secrecy, it is instructive to review a few salient and fundamental items.

¹¹ *Advisory Committee Note*, at 2.

¹² Particularly since the issue is one of policy, not procedure, Congress need not defer to the Supreme Court. Moreover, the Supreme Court is only a nominal sponsor of the proposed Rule changes. In dissenting from orders proposing various amendments to Federal procedural rules, Justices Black and Douglas repeatedly pointed out that the amendments are proposed by the Judicial Conference and receive only the most cursory review by the Court. Thus, when the Court promulgated certain amendments on January 21, 1963, they wrote: “The present Rules produced under 28 USC § 2072 are not prepared by us but by Committees of the Judicial Conference designated by the Chief Justice, and before coming to us they are approved by the Judicial Conference pursuant to 28 USC § 331. The Committees and the Conference are composed of able and distinguished members and they render a high public service. It is they, however, who do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power.” 374 U.S. 865, 865–70, 9 L.Ed. 2d 117, 117 (1963), (footnote omitted).

Again, on February 28, 1966, when the Court transmitted other amendments, Mr. Justice Black wrote: “The Amendments to the Federal Rules of Civil and Criminal Procedure today transmitted to the Congress are the work of very capable advisory committees. Those committees, not the Court, wrote the rules. Whether by this transmittal the individual members of the Court who voted to transmit the rules intended to express approval of the varied policy decisions the rules embody I am not sure.” 383 U.S. 1031, 1032, 15 L.Ed. 2d 117, 117 (1966) (emphasis added).

¹³ H.R. 6207, 94th Cong., 1st Sess., § 6 (sponsored by Representatives Rangel and Eckhardt).

¹⁴ Related bills in the last Congress include H.R. 1277, 94th Cong., 1st Sess.; H.R. 2986, 94th Cong., 1st Sess.; H.R. 10947, 94th Cong., 1st Sess.; and S. 3274, 94th Cong., 1st Sess. Among the provisions in these bills were a witness's rights to counsel while testifying before the Grand Jury and to access to the transcript of his own testimony.

Rule 6(e) was adopted in 1946 to continue to ensure Grand Jury secrecy and to make clear that any disclosures of the proceedings, except to those permitted into the Grand Jury room itself, must be by court order.¹² The persons permitted in the room are identified in Rule 6(d). Only the government attorneys, the witness, the stenographer, interpreters when essential, and the Grand Jurors can be present. All except the witness are sworn to secrecy. Because the "attorneys for the Government" as defined in Rule 54(c)—which definition does not include "other government personnel"—are permitted to be present, they also are permitted to review Grand Jury materials under Rule 6(c).¹³

That view is entirely consistent with the charge typically given to Grand Jurors which invariably stresses secrecy and also with the typical oath. It is a rather beautiful and traditional oath. Its spirit must be measured against the proposed amendment.

Given that history—given the spirit of that oath—intrusion on Grand Jury secrecy by the Government surely cannot be automatically permitted solely on the undocumented belief of a prosecutor that there must be disclosures to assist him in his duties.

It should be noted in this connection that nothing stops other government personnel from interviewing potential Grand Jury witnesses or even talking to them after their testimony if that witness voluntarily consents. That practice is widely followed. For example, the Internal Revenue Manual (Part IX, Intelligence, § 9266.6) provides:

"Secrecy of Grand Jury Proceedings and Disclosure :

"(1) Following an appearance before a grand jury, each grand jury witness should be interviewed by a special agent in an attempt to obtain the same information which the witness furnished to the grand jury. If the witness cooperates, any question of grand jury secrecy and the Service use of grand jury testimony for both criminal and civil purposes can thus be avoided.

"(2) If the witness refuses to respond to the questions asked by the special agent, the United States Attorney should be asked to obtain a court order under Rule 6(e), Federal Rules of Criminal Procedure (18 U.S.C. app.), to authorize the Service use of the grand jury testimony for both criminal and civil purposes. In the event the court declines to sign an order, the Chief should seek the advice of Regional Counsel."

Remarkably, assistance of government agencies at times comes with a string attached which broadly hints as some of the implications of any "routine" disclosure policy such as Mr. Thornburgh advocates. Thus, the Internal Revenue Manual (§ 1272-1-(10)70) provides:

"(1) Internal Revenue personnel will be authorized to act as agents of the Federal Grand Jury under the conditions that the U.S. Attorney or the Strike Force attorneys will make application for and secure a Federal Rule of Criminal Procedure 6(e) order that will release all records, information and testimony obtained through the use of the Grand Jury to the Service for civil as well as criminal tax purposes." (Emphasis added.)

Despite the history and the plain language of the present Rule, the Department insists that the proposed amendment must be construed to leave the matter virtually entirely to the discretion of the attorneys for the Government. The department urges a so-called "clarification"¹⁴ giving, again in Mr. Thornburgh's words,

¹² See the Advisory Committee Note to the original Rule 6(e), quoted in note (10), supra.

¹³ *Id.* Rule 6(d) provides:

"Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed, and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

Rule 54(c) provides: "'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and [certain other persons in cases arising under the laws of Guam.]"

"I, _____, as a member grand juror of this inquest for the District . . . do swear that I will diligently inquire, and true presentment make, of such articles, matters, and things as shall be given me in charge, or otherwise come to my knowledge touching the present service. The government's counsel, my fellows' and my own, I shall keep secret; I shall present no person for envy, hatred, or malice; neither shall I leave anyone unpresented for fear, favor, affection, hope of reward or gain, but shall present all things truly as they come to my knowledge, according to the best of my understanding. So Help Me God!"

¹⁴ Note the recognition that a court order is required to obtain disclosure of grand jury materials.

¹⁵ Thornburgh Statement, at 2.

the 'Department of Justice . . . routine authority to make disclosures to investigative agents and the like.'²⁹

Essentially, the theory is that such a view is benign rather than frightening because everyone involved is sensitive to Grand Jury secrecy. So, assertedly, there is no need to worry. However, such unquestioning faith is better reserved for institutions and principles instead of for the presumed uniform reliability of government personnel. That more conservative and traditional view is the essence of a government of laws and has vivid history to recommend it.

Moreover, it is only fair to ask if we must have unlimited confidence in the discretion of administrative agents, why not put the same trust in counsel for witnesses or for an accused, Counsel too, are subject to the contempt power. And, unlike "other government personnel," they are officers of the court.

The temptations encouraged by the proposed amendment, as the Department of Justice would have it, are obvious and easily illustrated. Over the past few years, it has become increasingly common to start an administrative investigation and, before it is completed, for the administrative agency to instigate the Department to request convening of a Grand Jury to investigate precisely the same matter.³⁰ The agency personnel who have worked on the matter are immediately made available to the attorneys for the Government. The attorneys may know little about the investigation or even why a Grand Jury has been convened. In effect, the Grand Jury is made a tool of the administrative agency to continue to pursue both its criminal and civil investigatory objectives.

The precise extent of this practice is itself hidden by the veil of Grand Jury secrecy. However, the patent problem has prompted both judicial and scholarly comment expressing grave concern as to the impact of this trend upon fundamental rights.³¹

The advantage to the Government of such administrative agency Grand Jury referrals is significant. Simply by convening the Grand Jury there can be an end run of careful protections fashioned by the Congress that must be observed during the criminal and civil administrative investigations, including presence of counsel, considerations of relevance, right to a transcript of your own testimony, and the like. Only last year, in the Tax Reform Act, Congress expanded these protections in the tax area.³²

The proposed amendment, as read by the Government, makes it readily possible and terribly tempting to utilize the Grand Jury to avoid such legislative sanctions.

Moreover, and unlike an administrative investigation, the Government can insulate both the course of the Grand Jury investigation and the extent of the information learned by waving the flag of secrecy, even though secrecy has become a one-way street.

A serious question may be raised as to whether, when an administrative agency has its own compulsory process power with the testimony and documents gathered thereby being fully usable either in criminal or civil proceedings, including in a Grand Jury, it is ever necessary to show secret Grand Jury materials to such agency personnel to obtain their assistance. Surely, when such an agency—

²⁹ *Id.* at 5 (emphasis added).

³⁰ One reason for administrative agency resort to grand jury process is set forth in the Internal Revenue Manual, part IX, section 9266.3 which provides, in pertinent part:

"(1) It may be appropriate to call an uncooperative witness before a grand jury as an aid in the investigative process.

"(5) Following the grand jury appearance, the procedures in IRM 9266.6 will be followed." (Emphasis supplied.)

[IRM § 9266.6 is quoted at pages 9-10, *supra*.]

This provision is labeled the "reluctant witness rule" and its validity has been described by at least one court as "highly suspect." *In Re Berkowitz*, 367 F.Supp. 1058, 1060 (E.D. Pa. 1973). Of course the IRS has the ability to compel the testimony of an "uncooperative witness" by use of its own statutorily provided process. See 26 U.S.C. §§ 7602-06. Given this compulsory process power, one suspects that the real reason for the reluctant witness rule is to separate the witness from his counsel. That end can only be achieved by use of the Grand Jury, for the witness has a right to counsel in IRS proceedings.

³¹ *In Re Grand Jury*, 77-1 U.S. Tax Cas. (CCH) ¶ 9146, at 86,198 (9th Cir. 1976). *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F.Supp. 1098, (E.D. Pa. 1975); Note, *Administrative Agency Access to Grand Jury Materials*, 75 Colum. L.Rev. 162 (1975).

³² Pub. L. 94-455 (October 4, 1976). In particular, a taxpayer was given the right to challenge an IRS summons of certain third-party records concerning him (26 U.S.C. § 7609, added by § 1205 of the Act) and the confidentiality of tax return data was strengthened (26 U.S.C. §§ 4102, 6103, 6108 and 7213, amended by § 1202 of the Act and 26 U.S.C. § 7217, added by § 1202).

like the IRS—chooses to go the Grand Jury investigatory route it is wrong to give the IRS all the powers of the Grand Jury process, thereby avoiding the protections Congress has fashioned regarding the agency's own investigation, and at the same time to permit disclosure of Grand Jury materials to IRS personnel who are "assisting" the attorneys for the Government.

If the amendment is adopted and construed as the Department would have it—in other words, no hearing and court order requirements—administrative agencies will tend to dominate Grand Jury proceedings even more than they do now. It is a dangerous trend and it should be stopped.

Yesterday, Mr. Thornburgh, in response to questioning, stated that there is "no fuzzing of the edges" between Grand Jury and administrative tax investigations because both the Justice Department and IRS supposedly are highly "sensitive" to the need for Grand Jury secrecy.²³

If there is no fuzzing, it is only because there are no edges to fuzz. Typically, the IRS, for example, initiates an administrative investigation and then, for reasons best known to itself, switches the investigation to a Grand Jury with Department approval. The very same IRS agents who conducted the administrative investigation are then detailed to "assist" the U.S. Attorney. Ultimately, these same agents make recommendations regarding the case both to the Department and for agency purposes. They could not, even if they tried, disregard what they have learned while "assisting" the attorneys for the government.²⁴

Clearly, disclosure of Grand Jury materials to such personnel does not "fuzz" the boundaries between the Grand Jury and the administrative processes; it destroys those boundaries entirely.

Further, Mr. Thornburgh stated that the assisting government personnel to whom disclosures are made could be brought before the Grand Jury to "explain" their "findings" based on the revealed testimony and documents.²⁵ Thus, the assisting personnel avowedly play a prosecutorial role in witness guise before the Grand Jury and, in effect, comment on the evidence given by other witnesses. Yet, the settled law is that even an expert witness is forbidden to be present in the Grand Jury room itself for the purpose of later commenting on another witness' testimony.²⁶

In addition, the recipients of the disclosures may later testify at the criminal trial. If so, that testimony inevitably will be shaped to take account of what has been learned from the disclosed Grand Jury materials. Effective cross-examination as to such subjective, and perhaps even unconscious influences, is exceedingly difficult at best.

It does no discredit to the attorneys for the Government to suggest that if there is to be an amendment it cannot be construed to permit them to make the determination of whether and to what extent disclosure is "necessary." There simply must be a court order; there must be a hearing unless judicially excused in a specific instance for good cause shown; there must be a showing of particularized and compelling need for examination of specific materials by the minimum possible number of identified personnel; and all use of the disclosed materials other than to assist the Grand Jury must be barred.²⁷ It must be demonstrated that the Department of Justice itself does not have its own resources to undertake or comprehend the task at hand.²⁸ The court order and hearing requirements are

²³ Note, however, that Judge Becker in his *Hawthorne* opinion observed that the Internal Revenue Manual shows "inadequate" sensitivity to considerations of Grand Jury secrecy. *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1126 n. 51 (E.D. Pa. 1975).

²⁴ The claim that there is "no fuzzing of the edges" does not square with the following knowledgeable description of the usual procedure when the IRS requests an open-ended grand jury investigation before concluding its administrative investigation: "Upon completion of the open-ended grand jury investigation, the evidence obtained is submitted to the Internal Revenue Service's Regional Counsel, where it is reviewed to ascertain if the matter is worthy of prosecution. If Regional Counsel concludes that prosecution is warranted, they will refer the case to the Tax Division of the Department of Justice. . . ."

C. Namorato, *The Government's Tools in the Investigation of a Criminal Fraud Case*, 34th Annual N.Y.U. Institute on Federal Taxation 1019, 1059 (1976). The author of this article is Chief of the Criminal Section of the Tax Division of the Justice Department and a former Special Agent of the Internal Revenue Service. *Id.* at 1019.

²⁵ *Thornburgh Statement*, at 6.

²⁶ *United States v. Edgerton*, 80 F. 374 (D. Mont. 1897); see, e.g., *United States v. Bowdach*, 324 F. Supp. 123 (S.D. Fla. 1971).

²⁷ See the authorities quoted in note (4), *supra*.

²⁸ See *In Re Grand Jury*, 77-1 U.S. Tax Cas. (CCH) ¶ 9146, at 86,193 (9th Cir. 1976).

opinion," the government personnel come from agencies like the IRS and the SEC having investigative, regulatory, and oversight responsibilities.²⁷

Otherwise, disclosures indeed will become the "routine" and without any meaningful court supervision. I respectfully stress that the concerns I have mentioned are not solved simply by imposing an aegis requirement that merely betokens record keeping and restricting the physical location where grand jury materials are kept. Even if administrative personnel fully comprehend and live up to such requirements, the secret information imbedded in the minds of these "other government personnel" can never be erased.

In short, the ramifications implicit in the proposed and poorly drafted changes, particularly as construed by the department, are many and difficult. The problems are masked by the one-sentence seeming simplicity of the provision and are passed over in the Advisory Committee note.

You are considering principle, not procedure. We do well to recall James Madison's admonition: "Temporary deviations from fundamental principles are always more or less dangerous. When the first pretext fails, those who become interested in prolonging the evil will rarely be at a loss for other pretexts. The first precedent, too, familiarises the people to the irregularity, lessens their veneration for those fundamental principles, and makes them a more easy prey to ambition and self interest. Hence it is that abuses of every kind, when once established, have been so often found to perpetuate themselves."²⁸

Mr. MANN. The subcommittee has received a letter dated February 18, 1977, from Tom O'Toole, Federal Public Defender, District of Arizona, for inclusion in the record of our proceedings.

A copy of this letter was circulated to the members of the subcommittee yesterday afternoon.

Without objection, Mr. O'Toole's letter will be made a part of the record.

Hearing no objection, the letter is made a part of our record.

[The letter referred to follows:]

FEDERAL PUBLIC DEFENDER,
DISTRICT OF ARIZONA,
Phoenix, Ariz., February 18, 1977.

Re Proposed Amendment to Rule 24, Federal Rules of Criminal Procedure.

HON. JAMES R. MANN,
Chairman, Subcommittee on Criminal Justice, House Judiciary Committee,
Rayburn Building, Washington, D.C.

DEAR MR. MANN: I am writing to you in opposition to the proposed amendment to Rule 24, Federal Rules of Criminal Procedure, which would result in the reduction of the number of peremptory challenges to prospective federal jurors and changes the procedure for obtaining additional challenges.

Due to the high volume of criminal cases filed in the District of Arizona, this office has broad experience with the jury selection process mandated by the 1968 Jury Act, the Arizona Jury Selection Plan and Rule 24, Federal Rules of Criminal Procedure. I can say without qualification that the number of peremptory challenges currently authorized (ten for the defendant and six for the government) does not delay voir dire procedure or the jury selection process. Should the proposed reduction in the number of peremptory challenges occur, such would not speed up the already brief process of selecting a jury. The entire jury selection process usually requires thirty to forty minutes in the District Courts in Arizona.

²⁷ "The classical case for the application of 6(e) orders is the IRS or SEC case (or in some instances the Postal Service, Customs, or Secret Service case), where the agency has a continuing regulatory or oversight responsibility with respect to the activities of an individual or corporation, and the use and retention of grand jury material beyond the aegis of the U.S. Attorney would breach the secrecy of the grand jury and pervert the grand jury process, though an order should not, for reasons discussed above, be limited only to such cases."

Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1126 (E.D. Pa. 1975).

²⁸ Whenever possible, the hearing should be an adversary one. Both the witness and the target should be given notice of the Government's disclosure application and should have the opportunity to contest it, except in extraordinary situations when the requirement presumably could be excused by the court. The extent of any hearing would be determined by the court on a case-by-case basis.

²⁹ 2 *Works of Madison*, 183 (1900).

It is of interest that in a recent land fraud trial which consumed 42 trial days and involved 7 defendants, 2 indictments and 46 separate charges, the jury voir dire and selection took less than 3 hours. In fact, in 9 years of practicing before the District Court I cannot recall any case, either simple or complicated, where jury selection was any longer.

Instead of expediting jury selection, reducing the number of peremptory challenges will very likely result in a more protracted voir dire process, where counsel for both the government and defense will be asking many more questions of the prospective jurors and making many more challenges for cause. In addition, a reduction in the number of peremptory challenges will require more of the Court's time to answer the requests of counsel, pursuant to Proposed Rule 24(2), Federal Rules of Criminal Procedure, for additional peremptory challenges. Such a change in jury selection process will slow jury selection with a consequent increase in cost to the taxpayer.

Any savings that the proposed change would effect by reducing the number of persons called for the jury panel would be offset by the added time spent in more extensive voir dire and in motions for additional challenges.

In conclusion, reducing the number of peremptory challenges can only detract from the right to a fair and impartial jury and trial, escalate the cost of running the judicial system and hinder the fair administration of justice. I therefore urge that your committee vote against any amendment to Rule 24, Federal Rules of Criminal Procedure.

Sincerely,

TOM O'TOOLE,
Federal Public Defender.

Mr. MANN. The subcommittee will now stand adjourned until next Wednesday, March 2 at 9:30 a.m. in room 2237.

[Whereupon, at 2:15 p.m., the subcommittee adjourned, to reconvene at 9:30 a.m. on Wednesday, March 2, 1977.]

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

WEDNESDAY, MARCH 2, 1977

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 2237, Rayburn House Office Building, the Honorable James R. Mann [chairman of the subcommittee] presiding.

Present: Representatives Mann, Holtzman, Hall, Gudger, Evans, Wiggins, and Hyde.

Also present: Thomas W. Hutchison, counsel; Robert A. Lembo, assistant counsel; and Raymond V. Smietanka, associate counsel.

Mr. MANN. The subcommittee will come to order.

The Subcommittee on Criminal Justice today concludes its hearings on the pending amendments to the Federal Rules of Criminal Procedure. Because of the time deadline we face, we will meet tomorrow to decide what legislative action we ought to take. If we decide that legislation is appropriate, I would hope to conclude subcommittee action on it no later than next week. This should enable us to get the legislation to the House before the end of April and give the Senate sufficient time to work on it.

We have already heard from representatives of the Judicial Conference, the Department of Justice, and the American Bar Association, as well as from a Federal judge, Federal public defenders, interested organizations and practicing attorneys. Today, we will hear from an equally varied group of witnesses.

Ordinarily, the House would go into session today at 3 p.m., and we scheduled accordingly. Unfortunately, it was announced Monday that the House is going into session today at 1 p.m., instead of 3. We are scheduled to hear from seven witnesses, so in the interests of fairness and of providing each witness with an adequate amount of time, the Chair requests everyone's cooperation in moving the proceedings along.

Our first witness today is Phylis Skloot Bamberger, who is here on behalf of the Legal Aid Society of New York City. Ms. Bamberger is the attorney in charge of the Appeals Bureau in the Society's Federal Defenders Services Unit.

We welcome you here today.

**TESTIMONY OF PHYLIS SKLOOT BAMBERGER, ESQ., ON BEHALF OF
THE LEGAL AID SOCIETY OF NEW YORK CITY**

Ms. BAMBERGER. Thank you, sir.

Mr. MANN. Your written statement will be made a part of the record and you may proceed as you wish, summarizing, outlining, synopsisizing.

Ms. BAMBERGER. My comments deal with three of the rules, those dealing with peremptory challenges, grand jury disclosure and search and seizure oral procedure.

With respect to the peremptory challenge I will be very brief. Our basic consideration is that in the Southern District of New York, the procedures for challenging jurors for cause so limit and so constrain counsel that it is virtually impossible for defense attorneys to establish justification for challenge for cause. Therefore, the peremptory challenge becomes critical not only to challenge jurors who counsel believes by instinct should not be on the jury, which is the normal use for peremptory challenge but to try to weed out people who counsel believes, based on the limited information that he has, should be challenged for cause.

My statement indicates that the procedures for empaneling a jury are largely within the discretion of the judges and that the judges ask the jurors the questions, and the judges often reframe the questions presented by counsel. I will give one very interesting example, which is in my statement. A question was posed or presented to the judge which asked the jurors if they could, if they would credit an agent's testimony more than they would any other witness. The judge reframed the question to say, "Could you follow my instructions that an agent's testimony is just as credible as any other witness?" The focus of the question was changed from whether the jury were able to evaluate the agent's testimony like anyone else's to whether they were able to follow the judge's instruction. I think that is a substantial change and shifts the focus of the question.

As a matter of routine in the Southern District, only the first juror is asked the specific questions. Other jurors are called, and sitting in a group are then asked as a group, "Do you have any response to the questions that were previously asked?" It requires a great deal of initiative on the part of a juror sitting in a large room of strangers to reveal a bias or prejudice or prior interest. Once again the information to establish challenge for cause is not likely to be revealed in those—in that situation.

Very often when a lawyer senses, based on prior questions that there may be a basis for further inquiry of a juror, the judge may not permit further questions.

Further, although this panel may not be aware of it, there has been a lot of construction in the courthouse in the Southern District of New York. Many of the new courtrooms are very small, substantially smaller than this room. If the judge, in his discretion, refuses to recess to the backroom for the challenge for cause, there is great likelihood, about which trial lawyers are very concerned, that challenges for cause will be overheard by jurors who are sitting very close to the judge's bench. Therefore a juror sitting close by may hear

that he or she has been challenged for cause, and, if permitted to sit, that juror is hardly an impartial juror.

So the point that we are trying to make is that the procedures are so constrained, counsel is so limited in what he is able to do in establishing a challenge for cause, that the peremptories take on even greater significance, and to reduce the number, I believe and the lawyers who try the cases believe, will seriously impair a defendant's right, not only to preemptory challenges but to a fair and impartial jury.

I think those are the factors which should be considered in determining whether this rule should be permitted to go into effect.

Rule 6 deals with disclosure of grand jury testimony to the Government agencies that are not defined as Government attorneys. We believe that this disclosure should not be permitted.

Grand jury investigations in the Southern District are very broad and sweeping. They often involve people who are never indicted, based on evidence which is not sufficient to establish probable cause. The disclosure of this evidence to Government agencies who may be conducting other investigations or who may use this material for other investigations we believe to be unjustified.

The U.S. Attorneys' Office has the power through other means of investigation to obtain many of the complex items to which this rule apparently relates. I would assume it has to do with antitrust cases or SEC cases. This information is often available through other means, and if it is obtained through other means can be revealed to Government agencies.

I think that the permitted disclosure to other Government agencies which may have other interests when the issue of complexity is not defined in the rule and the use to be made of this information is not explicitly laid out in the rule, is too general to protect the people who testify or produce documents before the grand jury.

With respect to rule 41(c), that is the permission to grant a warrant for search and seizure based on an oral presentation of a Government agent to the magistrate. On the surface, and as the advisory committee notes indicate, this rule appears to be fine. The notes indicate that it is to be used to encourage the use of warrants, rather than have an agent conduct searches without warrants.

However, we really believe, based on the documentation which we have in the statement, that this rule will be abused and that Government agents will not use the oral procedure to increase the number of searches conducted with warrants, but will use it to decrease the number of times they will physically appear before a magistrate on a written affidavit.

I think the prime example of the abuse of Government agents of the strict and specific procedural requirements that Congress requires is the wiretap provisions of the Omnibus Crime Control and Safe Streets Act of 1968, that is title III. In my statement I indicate on pages 10 and 11 that while Congress was quite specific in what it required in affidavits and in the procedures, in numerous occasions Government agents have simply ignored those. For instance, the statute requires that agents indicate the number of investigations, or the methods of investigations other than wiretapping that have been used

but have been unsuccessful, thereby necessitating the use of wiretapping or eavesdropping.

Uniformly the affidavits have said only that other forms of investigation have been used and have proved to be unsuccessful, period. There is no elaboration. There is no explanation. Based on those affidavits the wiretap orders are issued.

In two court decisions, well actually two court cases, one has resulted in a decision and one is presently sub judice, Government agents have used wiretap orders as justification for surreptitious entries into people's homes and businesses to place bugging devices. The case that has been decided is *United States against Ford*, in the District of Columbia circuit. The case presently sub judice is *United States against Scafidi*, in the second circuit.

In these warrants there was, well, in the second circuit case there was no request for surreptitious entry.

But despite the absence of the requests, the agents entered in the second circuit case eight times to place devices, to move devices, to put batteries in and then to remove the devices. And despite the fact that the statute is very specific on what can be done and the statute does not affirmatively permit surreptitious entries but includes nothing that would permit those entries, the agents have so entered as exemplified by these two cases.

The statute also requires that the agents name those individuals who are known to them who will be wiretapped. A recent decision of the Supreme Court, *United States against Donovan*, indicated that the agents as a pattern do not list the names of the people they know who will be wiretapped. Now, while the Supreme Court in *Donovan* refused to suppress evidence based on that defect, because it felt that the omission wasn't substantial enough to require reversal of a judgment of conviction, nonetheless, the agents have violated that specific provision of the statute.

The dissents from denials of petitions for writs of certiorari of Mr. Justice Brennan, notably in *Scott* against *United States* has indicated that the Government also has established a pattern of failing to follow the minimization requirements of the Omnibus bill which are very specific. The agents are required to turn off the monitoring devices when they believe they are listening to a conversation which has nothing to do with the investigation that they are conducting. Once again, time and time again, the agents do not turn off the machines; they listen continuously for many hours to the people whose telephones or premises are being bugged or tapped.

And, so I do not think that we can accept the premise that the agents will use the present proposal in the way that it was intended to be used. I think that, as I indicated, that they will use it as a device to avoid appearance before the magistrate and not as a device to limit the number of times they will make an entry or search and seizure without a warrant at all.

The other problem I believe exists with the rule, one with which the courts and Congress are continuously concerned, is that the magistrate who has to issue the warrant will merely issue a pro forma warrant based on the representations in writing by the agent who comes before him for the warrant. The concern is that the magistrate will not examine the individual agent, that he will not, for example, ascertain

who the informer is if there is an informer involved, the source of the information of the informer, or the basis for the informer's conclusion upon which the agent is relying to get his search warrant. I think those concerns are increased when we are dealing with a telephone conversation.

It is extremely difficult to examine someone over the telephone. Magistrates are more likely to act as rubber stamps to the agent's request for a warrant in the circumstance of a telephone.

Going further, the rule requires that the telephone conversations be recorded. In my personal experience and the experience of many of the lawyers who practice in the courts in the southern district, the recording devices used by the Government are inadequate. These recording devices are used in parole revocation hearings, in proceedings before the magistrates, including trials in minor offenses under the Magistrate Acts and, of course, they are used in Government wiretaps and we have to read the transcripts for trials. They are basically inaudible. The sentences are unconnected, paragraphs are unconnected, responses are unclear. It is almost impossible to create a cohesive transcript.

The rule requires that these transcripts be certified. I can't imagine who would certify a transcript that is basically inaudible.

These reactions become from personal experiences, and, of course, if the tape is inaudible, it is very difficult at a later suppression hearing, if one is conducted, to determine what information the magistrate relied upon in issuing the warrant.

So there is a technical difficulty, as well as difficulties in whether or not the intent of the rule will be effectuated.

There is one further factor which I think is important. The courts have created a presumption of the legality of a search and seizure where a warrant has been obtained. There is no reason—well let me step back.

At a pretrial suppression motion, a defendant is faced with the apparent fact that an independent and neutral magistrate has already determined that there is probable cause and the presumption of district judges based on this circumstance is that there is less likelihood that the search and seizure was illegal.

A different attitude applies when a search and seizure is conducted without a warrant. The courts are very concerned as to whether or not the agent has acted improperly.

Now, based on our belief that it is not possible to preserve a fair record and our belief that the magistrate will not cross-examine or carefully interrogate an agent seeking a warrant over the telephone, the defendant will be faced with a presumption that the search warrant was properly issued and a factual situation where that presumption may not be valid.

I am not saying that it wouldn't be valid.

I am saying that in many situations it may not be valid. I think the defendant is put in a substantially prejudiced atmosphere because he is faced with a procedure over which he has no control over, and neither does anybody else if our assumptions are correct. Yet the defendant comes into court on a suppression motion and the judge believes that all the procedures have been properly followed.

I think that is the substance of my statement with respect to the three rules.

If there are any additional questions or any questions for additional information from you gentlemen, I will be happy to respond.

Mr. MANN. Thank you for a very succinct statement.

Mr. Wiggins.

Mr. WIGGINS. No questions, Mr. Chairman.

Mr. MANN. Ms. Holtzman.

Ms. HOLTZMAN. I just would like to welcome the witness. I'm sorry I came in late. I gather that the thrust of your testimony is in opposition to the rule respecting the issuance of warrants based on telephonic conversations?

Ms. BAMBERGER. Yes.

Ms. HOLTZMAN. Would your feeling change if it were mandatory for the agent to go before the magistrate?

Ms. BAMBERGER. As I indicated in the statement, I believe that the tape recording which is presently required by the rule is mechanically inadequate. In our experience, tape recording devices or the recording devices used and methods in which they are used are woefully inadequate, making transcripts of those tapes almost impossible.

We have used tape recordings in parole revocation hearings, in trials before magistrates, and when we have to, review transcripts of tape recordings that will be used in trials. And it is very difficult to make a cohesive thing of the tapes. Sentences are interrupted or are inaudible. There is no connection between the conversations that people are conducting. I think it's fair to attribute that to the inadequacies of the mechanical devices.

One would not be able to preserve an adequate record based on the mechanical devices that are presently used.

Ms. HOLTZMAN. Thank you very much. I have no further questions, Mr. Chairman.

Mr. MANN. Mr. Hyde.

Mr. HYDE. I can only say they certainly preserved an awful lot of tapes in the Watergate case. I mean, to refuse to use a modern technology to implement and expedite the issuance of a warrant because the record would be inadequate—it seems to me if it's inadequate it's inadequate. But what happens as I understand under this proposed rule is a telephone call to the magistrate. Certainly the magistrate can listen and understand and the record or transcription is made of what has gone over the phone.

There are all kinds of recordings that are very successful and could be very damaging, as the Watergate defendants well know.

Well, that is just my comment. I would hate to see a modernization of the issuance of warrants defeated because it supposedly isn't technically feasible. I just question that, that's all.

Ms. BAMBERGER. I wish to indicate that that is not the only objection that we have to the procedure setup. I also wish to indicate that assuming that some kind of technique can be developed so that the whole conversation can be received on that tape, obviously we would have to withdraw our objection based on those grounds. But I think it's fair to say that a defense attorney who has to function based on every word that is in the transcript and needs the context as well as every word, that the present devices used are inadequate.

Mr. WIGGINS. Ma'am, the magistrate who issues a warrant is required to certify the accuracy of the transcript.

Ms. BAMBERGER. Yes.

Mr. WIGGINS. If in fact the transcript is illegible or rather indistinguishable, and this is not an accurate presentation of what occurred, isn't it reasonable to believe the magistrate could not certify it? That problem you foresee would be overcome by this certificate signed by the magistrate?

Ms. BAMBERGER. Well, he could refuse to make the certification. I think the intent of the rule is to avoid that problem, so that you will have a situation where a warrant is issued validly and people subsequent to the issuance can examine it. Now, without any certification you have a record which once again may adversely effect the defendant in a suppression proceeding because he really is in no position to know what happened, whereas the magistrate and agent are because they were there. So there is no way where the defendant can adequately present his side except by an absence of the record.

Mr. WIGGINS. Well, of course, that is the problem with all warrants, the target of the warrant is not there, it's not an adversary hearing as to whether there should be a warrant issued. It's only a one-party procedure. I don't understand your concern that the person who later on may seek to suppress evidence produced has not had a fair opportunity to make his case to the magistrate.

Ms. BAMBERGER. Well, that position is tied in with what I conceive to be the presumption that a warrant is validly issued when one had been issued.

Mr. WIGGINS. I understand.

Mr. HYDE. I have nothing further.

Mr. MANN. All right. Mr. Hall.

Mr. HALL. Mr. Chairman, I will pass just for the moment.

Mr. MANN. All right. I am curious about voir dire under rule 24. We have not heard from anyone who says voir dire is adequate in Federal courts. Have you heard of any Federal courts that give adequate voir dire?

Ms. BAMBERGER. Not in my knowledge, but I admit my knowledge is limited to the eastern and southern districts of New York.

Mr. MANN. I'm not sure how much coordination and exchange of information on practice the Federal judges engage in, but I am curious as to why judges with varying backgrounds—some from areas where there is an extensive voir dire examination—get on the Federal bench and then ignore the implications of rule 24(a).

Ms. BAMBERGER. Well, as I hope that I indicated earlier, there are a few judges, some, that are exceptions to this general pattern. But this seems to be the most common pattern.

Mr. MANN. All right.

Ms. BAMBERGER. If I may make one further addition, the Advisory Notes to rule 24 seem to indicate a concern for the time involved in selecting a jury. As the statement indicates, but I think it's relevant to repeat, the average time in the southern district of New York for empaneling a jury is 25 minutes, I'm sorry, is 35 minutes. The shortest time is 25 minutes, and even for complex cases, it seldom runs to longer than 4 hours.

Furthermore, in complex cases, although the judge has the discretion to permit defense attorneys to have additional peremptory challenges, very often the judges require that the defense attorneys exercise those peremptory challenges as a group.

This hardly permits defense counsel to make an individualized decision as to what is best for his client. The only winner in this procedure is perhaps the Government, who has itself chosen to create the situation in which there may be multiple, in the southern district, some 30 or 40 cases a year, I'm sorry, 20 to 30 cases a year of multiple defendants, that is, over 8.

Mr. MANN. Anyone have any further questions?

Ms. HOLTZMAN. Yes, Mr. Chairman. Just to get back to rule 41, although the rule itself would suggest that the oral testimony shall be recorded and transcribed, I think the advisory notes do not require a tape recording of the conversation.

Indeed, the accompanying Advisory Committee Notes suggest that the substance of the conversation can be recorded by the notes of the magistrate, and there is no requirement that a verbatim tape recording be made of the conversation. It seems to me, therefore, that your concern about the ability to attack a showing of probable cause is substantial. I don't know that magistrates are trained in shorthand, in fact, I rather doubt that is a qualification for the job.

If they do not have a tape recorder, and they are not required under this rule to have one, how would there be a transcription made of what happened? Indeed, the magistrate can certify that to the best of his recollection this is the substance of what was said but that may not be sufficient to allow for a searching examination of the facts and nature of what exactly was said.

Do you agree with that?

Ms. BAMBERGER. But I'm not—the magistrate's notes in fact may not provide a basis for challenge of probable cause, but the transcript aspect of it is a separate way to take down the proceedings.

Ms. HOLTZMAN. Yes, but what I'm saying to you is that there is no requirement that that transcript be based on a tape recording of the conversation. The Advisory Committee notes say only that it is contemplated—

Ms. BAMBERGER. Can you please tell me where you're reading?

Ms. HOLTZMAN. This is the Advisory Committee note to rule 41. It says, and I quote:

It is contemplated that the recording of the oral testimony will be made by a courtroom reporter by mechanical recording device or by verbatim contemporaneous writing by the magistrate.

Well, since as I said stenography is not, to my knowledge, a requirement for the position of being a Federal magistrate, I don't know how we can expect to have, in all circumstances, a verbatim transcript of that conversation between the magistrate and the officer who calls on the phone.

Therefore, if you're going to rely on the statement by the magistrate as to what in substance was reported to him, that may not permit a proper challenge and proper search of the proceeding under which the search warrant was obtained.

Do you agree with that?

Ms. BAMBERGER. I agree with that; yes. Yes.

Ms. HOLTZMAN. In fact, the rule is ambiguous as to whether the entire conversation has to be recorded. It doesn't say that the entire conversation between the magistrate and officer has to be recorded; does it?

Ms. BAMBERGER. Well, it doesn't say that, but one would imply that when the tape recorder, if a tape recorder is used, if it's turned on, that it will not be turned off until it's finished. Whether it's turned on or off—

Ms. HOLTZMAN. There is nothing in the rule that requires an entire, complete record of the conversation. In fact, it would be hard for them to reply on the contemporaneous writing of a magistrate.

Ms. BAMBERGER. Maybe the ambiguity of the rule itself creates a problem. The point that I wish to make is that when an agent prepares an affidavit and comes before the magistrate, he knows in his mind what information he already has to establish initial probable cause. A court later reviewing a decision to issue a warrant based on that information can determine if probable cause is established both as to the commission of a crime and the defendant's commission. Now, here the procedure is based on what the magistrate, either what the magistrate recalls of what he can take down while he is listening or what he recalls immediately thereafter, or what may be taken down in an incomplete or inaudible tape.

I think that on either way we are not left with much to work with.

Ms. HOLTZMAN. Well, I am less concerned with the inaudible or incomplete transcript, but I would suggest to the gentleman from Illinois that had he been on the House Judiciary Committee and listened to the tape, he would have had a very good idea of how inaudible tape recordings can be.

Mr. HYDE. They are going to issue them commercially, I guess, and make money on them, aren't they? I'm sorry, I didn't mean to interrupt you.

Ms. HOLTZMAN. My concern is not with the audibility or inaudibility of tape recordings, but I would certainly urge the gentleman from Illinois to find out the facts with respect to the quality of the recordings that we heard before the House Judiciary Committee. My concern is with the fact that there is no requirement to use a tape recording and therefore what you may have instead is "a contemporaneous record made by the magistrate."

Now, "contemporaneous" is not defined, it doesn't necessarily mean "simultaneous." It could be a transcription or writing made 5 or 10 hours later or the next day or two, three days later. We don't know what "contemporaneous" means.

Ms. BAMBERGER. That's correct.

Ms. HOLTZMAN. Second, there is no requirement that that be a verbatim transcript of what happened.

Ms. BAMBERGER. That's correct.

Ms. HOLTZMAN. And third, there is no requirement as to what the contents of that transcript would be. There is nothing here to say that it is insufficient for the magistrate to say that the officer gave me sufficient facts on which I base probable cause. That could possibly satisfy requirements under this rule.

I am not interested necessarily in whether this is good or bad for defendants. I just think it's important to have a record on which we can scrutinize whether probable cause had been made out.

Ms. BAMBERGER. I think that's correct. The same problem exists now to a lesser degree where a magistrate interrogates an agent, which he can do, who comes before him with a warrant application based on an affidavit which may have inadequate information. Very often we do not know what the results of that subsequent interrogation by the magistrate of the agent are. Even there we have an incomplete record with which to seek relief in the courts.

Mr. HYDE. Mr. Chairman, Ms. Holtzman, would you yield?

Ms. HOLTZMAN. I have finished.

Mr. HYDE. Isn't it a fact, then, that this would provide a much wider basis for questioning the sufficiency of the warrant because here you would have at least, if not a verbatim, a substantially adequate at least in the mind of the issuing magistrate, recording of what went on which would include the questioning by the magistrate of the person on the telephone?

Isn't it true many times the applicant for the warrant is not the person who has the information?

Ms. BAMBERGER. That's certainly true and that's—

Mr. HYDE. But here is the opportunity for that person to get on the phone and say, "Your Honor, this is what we are observing and this is where I am and I suspect that there is a crime that had been committed or is about to be committed."

Ms. BAMBERGER. It's our basic position that in a telephone situation it would be impossible for the magistrate to conduct the search and examination or even perhaps to get the information that he needs to make a determination.

For instance, as we indicated in the statement, what happens if an agent is talking from a public telephone and runs out of coins, how is the magistrate going to make his determination as to whether there is probable cause? Or what happens if the agent calls the magistrate and the magistrate's line is busy? What does he do then? The whole procedure—then the agent can come and say, "Well, I tried to get the warrant but the line was busy."

Mr. HYDE. "So I didn't get the warrant."

Ms. BAMBERGER. Yes, but then we have a question of what good is this procedure altogether. Really, what it's doing is giving the agents an excuse for not appearing before the magistrate—because in that situation maybe he really had time to go to the magistrate and he's excused from not going to the magistrate in person with a written affidavit—is that he tried to make a phone call but the line was busy.

Maybe he should have gone to the magistrate in person. One of the basic principles upon which we rely here is that investigating agents, and there is evidence for that, as I indicated from the examples from the wiretap section, that they will use this in an effort to reduce the number of times they have to appear rather than to reduce the number of times they act without a warrant altogether.

Mr. HYDE. I think that is a very valid criticism and something to be watched. But on the other hand, it would certainly facilitate the issuance of warrants where the physical presence of the applicant may be very difficult, may be miles and miles away from a magistrate, as

distinguished from New York, out in the West the magistrates are not that readily available.

Don't you think in balancing the possibilities of abuse that you have prophesied balancing that against the facility of getting a warrant in a situation where magistrates just aren't that available, but my God, we have had the telephone for years.

Ms. BAMBERGER. Well, it seems to me that if the procedures and—which Ms. Holtzman pointed out are so vague—are to be used, perhaps there should be, to clear up the mechanical difficulties, there should be more specific provisions that—

Mr. HYDE. I think that is a valid comment. I just want to say that I don't quite agree with Ms. Holtzman's characterization of extreme vagueness. The notes say the oral testimony must be recorded at this time, so that the transcribed affidavit will provide an adequate basis for determining the sufficiency of the evidence if that issue should later arise and that is about as specific, I suppose, as you can get.

Ms. BAMBERGER. Perhaps we have to indicate that the magistrate must do it the minute the phone is hung up.

For instance, I can envision in the southern district of New York, where we do have a magistrate on duty most of the time but where there are arraignments virtually every 5 minutes, that the magistrate hangs up the telephone, a defendant or person just arrested is brought into his office and the agents need an immediate hearing for bail or assignment of counsel or whatever and the magistrate doesn't have the time to do it right then.

Mr. HYDE. Right. We have to have precautions to prevent that.

Ms. BAMBERGER. Yes, on the mechanical side. On the substantive side, we adhere to our objections most strenuously.

STATEMENT OF PHYLIS SKLOOT BAMBERGER, ON PROPOSED AMENDMENTS TO
FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 24

Proposed Rule 24 of the Federal Rules of Criminal Procedure grants five peremptory challenges to each side in a case involving a crime punishable by a term of more than one year. The district judge may, in his discretion, grant additional challenges for good cause or if the case involves more than one defendant. This rule reduces the challenges available to a defendant by five, and makes the number equal to that allotted to the Government.

The reasons given for the proposal are the prevention of "misuse of the peremptory challenge as a means of systematic elimination of members of a given group from the jury" and to "accelerate the *voir dire* procedure and facilitate savings on juror costs through the use of smaller jury panels."

It is respectfully submitted that the proposed revision in Rule 24 should not be permitted to become effective since in the context of the remainder of the jury selection process, defense counsel has virtually no opportunity to challenge a juror for cause successfully. Therefore, reducing the number of peremptory challenges produces the great risk that a criminal defendant's constitutional right to a fair and impartial jury of his peers will be violated. The reasons given by the Judicial Conference for the revisions are, in our experience, either based on unfounded concerns or are far outweighed by the constitutional guarantee.

Experiences of Federal Defender Services Unit attorneys in the Southern District of New York reveal that while the minutiae of the jury selection process varies with each district judge, the general procedure now used makes it virtually impossible for the defense to develop any basis for a challenge for cause. Generally, counsel must submit his questions for the panel to the district judge, who can select the questions he wants to ask or can rephrase the questions. Often

this restructuring of a question shifts its emphasis and thereby permits a juror, albeit, inadvertently, to avoid thinking about or revealing a bias or prejudice. Thus, for example, where defense counsel has submitted the question: "Would you be more likely to believe an agent of the Government than other witnesses?" the judge has rephrased the question to inquire: "If I instruct you that you are to give no greater credence to a Government agent than to other witnesses will you be able to follow that instruction?"

The jurors, properly concerned with the fulfillment of their obligations to follow the judge's instruction, do not focus on the substance of the inquiry, which is the critical question of whether they could disbelieve an agent.

Even after the judge determines what questions to ask, some judges actually ask the specific questions only of the first juror. As to the rest of the panel, the judge asks the collective group if there are any responses to questions already asked. This procedure assumes that each of the other prospective jurors is listening to the questions, and feels constrained, in essence, to volunteer a response in front of a large group of strangers. From experience in viewing jurors, attorneys state that a juror may use this process to avoid making a statement he might otherwise feel compelled to make if a specific question were put to him. In a trial held recently in the Southern District of New York, this type of questioning, in which direct responses can be avoided, resulted in the seating of a juror who could barely speak English.

Important questions usually not repeated are whether a juror was a victim of a crime or has had previous jury experience in a criminal trial. These questions are obviously significant ones to evaluating whether a juror can fairly appraise the evidence or believe that the defendant is presumed innocent despite the accusations against him. However, since members of the jury panel participate in juries before both state and federal judges who have a variety of personalities, the question has added significance. Many judges, after a verdict of acquittal, will excoriate the jurors for such a verdict. The ability of a juror to render a verdict of acquittal thus becomes not a hypothetical problem, but one of practical significance.

After the jurors are asked basic questions, if the need arises, defense counsel will request that additional inquiries be made if a particular response seems to call for further exploration. However, in the experience of Federal Defender attorneys, some district judges refuse either to make further inquiries themselves or to permit counsel to do so. The limited questioning has resulted in the seating of a juror who had attempted suicide in a case in which it was asserted that the defendant's conduct constituted a suicide attempt; of a juror who was a personal friend of the United States Attorney for the Southern District of New York; and of a juror who was a relative of an employee of the defender organization.

As to the physical side of the procedure, it must be noted that many newly constructed courtrooms are small, making it difficult to hold a bench conference out of the hearing of the prospective jurors waiting to be sworn. Since judges often deny an in-chambers conference, any challenge for cause is often within the hearing of the jurors. Because most challenges for cause are denied, a juror may be seated who has overheard counsel challenge him for cause. That juror is no longer impartial.

Our experience establishes that the present procedure does not permit development of information that will enable defense counsel to successfully challenge for cause and that defense counsel must rely on peremptory challenges to exclude prospective jurors believed to be unqualified to sit. Further, our experience also shows that prosecutors tend to challenge peremptorily black and Puerto Rican, as well as young professionals as members of the jury panel. These prosecutor's challenges can, for the most part, be based on observable characteristics or on facts known from information given to the Government by the juror. Defense counsel's challenge to a juror is based on far more subtle information and because his opportunity to question is so often limited, he cannot learn that information. Thus, it appears that, with the present limitations on challenges for cause, there is not only justification, but a need, to retain the present 12 peremptory challenges so that counsel can at least act on his intuition. The same reasons also justify permitting the defense a number of challenges larger than that permitted to the Government.

Joint trials present an additional problem. District judges are reluctant to grant extra challenges because the case involves multi-defendants. Further, in many cases the defendants are compelled to exercise the challenges jointly. The

joint exercise of the challenges offers little or no protection for the individual defendant. His interests may be as different from those of his co-defendants as they are from those of the Government. In the Southern District of New York there may be as many as 20-30 multi-defendant trials in a year. There are many other cases involving two defendants. In all these cases, joint exercise of challenges benefits only the Government.

The time involved in selecting a jury in the Southern District of New York is currently an average of 40 minutes. The shortest period of time involved is 25 minutes. In complex trials, the selection period is about four hours. Thus, the concern for the time spent on jury selection does not seem to be a proper cause for concern.

An attorney with many years of experience has stated he has seen one successful challenge for cause in approximately 50 trials. This conclusion alone should give pause as to the justification for the proposed amendment. However, the full jury selection process should result not only in rejection of the proposal, but in reappraisal of the entire procedure.

PROPOSED RULE 6

Proposed Rule 6 permits disclosure of matters occurring before the grand jury other than deliberations and votes to "such other Government personnel as are necessary to assist the attorneys for the Government in the performance of their duties." We believe that there are sufficient substantial questions as to the appropriateness of permitting the disclosure outlined to warrant a refusal to give the proposal effect. Furthermore, we believe that the proposal as written is far too broad to be justified even assuming there is some limited need for disclosure.

In the Southern District of New York the grand jury proceeding is often used to gather evidence unavailable to the Government through other investigative channels. Further, grand jury investigations are often broad and far-reaching, going way beyond a single defendant or a single crime to cover an entire industry, or organization. The information collected may be used as the basis for other investigations.

The rule as drafted virtually ends the secrecy of the grand jury process to the benefit of the Government. The scope of the term "Government personnel" remains undefined. The Advisory Committee notes seem to include investigative personnel from the Government agencies. However, these agencies are often involved in investigations and proceedings of their own and may use the testimony and exhibits before the grand jury for their own purposes, including harassment of a particular industry or individual coming within the agency's jurisdiction.

Further, it is not clear whether Government personnel would open the door to permitting private contractors to be retained by the Government attorneys for purposes of analyzing the evidence or data, and does not make certain what circumstances make it "necessary." Further, while the advisor's notes speak of complex cases, there is no definition of complex and that word is not used in the proposal itself.

The rejection of the proposal does not make it difficult for Government attorneys to use experts to assist in preparing cases. Evidence available to the prosecutor through other means can be analyzed by those aiding in the preparation. However, since, as noted above and recognized by the Advisory Committee's notes, the broad power of the grand jury is often used by Government attorneys to obtain evidence otherwise unavailable and is subject to abuse. One protection against this abuse is secrecy from other Government agencies. Therefore, the proposal should be rejected.

RULE 41(C) (2)

Proposed Rule 41(c) (2) establishes a procedure for issuing a search warrant based upon the oral statement of the agent seeking the warrant. Since this proposal is subject to likely misuse by agents, raises substantial basis for believing that the magistrate's decision to issue the warrant will be *pro forma* rather than the independent approval of a "neutral and detached" judicial officer, and will prejudice the defendant's opportunity to challenge the agents' conduct, it is respectfully submitted that the proposed amendment should not be permitted to become effective.

The Advisory Committee Notes indicate that the provision is to apply to those instances when it is not reasonably practicable for the agent seeking a warrant

to present a written affidavit to a magistrate. The Notes also state the proposal is to encourage use of warrants. Notwithstanding the intentions and expectations of the Advisors, there is substantial basis for believing that the oral procedure will not reduce the number of instances in which searches are made without any warrant at all, but will increase the number of times that a federal law enforcement officer will improperly avoid a personal appearance before a magistrate seeking a warrant based upon a written affidavit. This conclusion is a fair one based on the experience that law enforcement officers often conduct warrantless searches when there is time to obtain a warrant and there are no exigent circumstances justifying a search without a warrant.

Further evidence that the procedure is likely to be abused is the failure of law enforcement agents and prosecutors to comply with the specific and detailed requirements included by Congress in the federal wiretap statute (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sec. 2510-2520 (1970)). Despite the requirements that affidavits in support of wiretap orders include a specific statement of the other means of investigation that have not succeeded thereby necessitating use of electronic surveillance, the assertions included in affidavits on these questions have been routinely conclusory, giving no particularized information. The government has also used eavesdropping orders as justification for numerous surreptitious breakings and enterings into private homes and businesses to place the electronic devices (e.g. *United States v. Ford*, D.C. Cir. Doc. No. 76-1503 (February 11, 1977); *United States v. Scafidi*, 2d Cir. Doc. No. 76-1495 (*sub judice*)), has failed to follow the sealing requirements (*United States v. Scafidi*, *Supra.*), has failed to name those known individuals will be wiretapped (*United States v. Donovan*, Sup. Ct. Doc. No. 75-212 (January 19, 1977)), and has failed to minimize the interceptions (*Scott v. United States*, Sup. Ct. Doc. No. 75-5683, dissent of Mr. Justice Brennan, 44 U.S. L.W. 3562 (April 6, 1976)). Given such conduct by government agents where Congress has outlined specific requirements, there is little basis for believing that government agents will use the procedure to avoid warrantless searches rather than avoiding an inperson appearance for a warrant.

The Advisory Committee's Notes acknowledges that the proposal will deprive the magistrate of the opportunity to confront the agent and to have demeanor evidence. This absence creates a serious defect in the procedure for the magistrate is deprived of the ability to evaluate the agents credibility and seriously limits the magistrate's ability and incentive to examine the agent, for example, as to the reliability of an informer and the factual basis for his conclusions as is required under the Supreme Court decisions in *Aguilar v. Texas* and *Spinelli v. -----*. In addition to the obvious problem of examining over the telephone a witness who cannot be seen, it is absurd to imagine an agent on a public telephone being questioned as he runs out of coins.

The warrant-seeking process raises concern that the magistrate who issues the warrant does not actually make his own decision on the probable cause issue, but merely rubber stamps the agents decision. The proposed rule causes added concern as to this matter.

The mechanics for preserving the oral representations made by the agent to the magistrate over the telephone are not satisfactory. Defense Counsel's experience with government recording devices, used in parole revocation hearings, magistrate proceedings, and, of course, in government electronic interceptions, requires the conclusion that the tapes are largely inaudible. The transcripts made from them are often composed of partial sentences and unconnected conversations. The difficulty of reproducing the transcripts will make it difficult to comply with the certification requirements, and to establish exactly what information was relied upon to establish probable cause.

Another significant difficulty raised by the procedure arises from the presumption in favor of the validity of a search warrant. This presumption applies when the legality of search and is attacked by way of a Pre-trial motion to suppress any evidence obtained from that search and seizure. The courts apply the presumption to encourage use of warrants. The presumption has been justified on the ground that a neutral and detached magistrate already has determined that probable cause exists and that in any event the written affidavit is before the district judge for his consideration of the motion to suppress. There is no basis for concluding that the presumption will not also be applied by the Courts to warrants obtained by the oral procedure. However, for the reasons previously stated, the application of the presumption is unjustified and will therefore prejudice a defendant in an attack on the validity of the search and seizure.

The proposed change in Rule 41 should be rejected.

Mr. MANN. Thank you so much.

Our next witness is Andrew Bowman, Federal Public Defender for the District of Connecticut. Prior to becoming public defender, Mr. Bowman served as assistant U.S. attorney in Connecticut.

We have your written statement, which will be made a part of the record, and you may proceed as you see fit.

**TESTIMONY OF ANDREW BOWMAN, FEDERAL PUBLIC DEFENDER,
DISTRICT OF CONNECTICUT**

Mr. BOWMAN. Since I have been preceded by many in the Federal defender system who have given you a background with respect to peremptory challenges more extensive than the one I am going to give you today, I wish to focus my comments on the problems of the individual voir dire, which I think is essential to the selection of a fair and impartial jury, in the problem of the exclusion of black veniremen which we have experienced.

Jury selection in Connecticut is a so-called struck system which means that approximately 50 to 60 people are ushered into a courtroom. Usually more than one jury in Connecticut is selected on a particular day. After counsel have submitted their voir dire questions to the judge in writing, the judge makes inquiry of the entire panel collectively sitting in the courtroom and in the normal course of events, approximately 20 questions are asked of the panel.

After challenges for cause are made the clerk then draws from the jury wheel a number of names equal to the jury of 12 plus alternates plus the number of peremptory challenges, which now is 16, 6 for the Government, 10 for the defense. Once the names are drawn each side exercises its challenges, sometimes on an alternating basis and sometimes simultaneously. By "simultaneously" I mean that the defendant does not know who the Government has struck and the Government does not know who the defendant has struck so that there is substantial probability and great likelihood that you are striking the same juror and, therefore, although you are allotted 10 peremptory challenges as a defendant, in reality you may be challenging a lot less, or I should say a lesser number of people because the Government has also struck the same person.

Mr. MANN. How do you do that, in writing?

Mr. BOWMAN. Yes, the clerk typically goes to the Government, the Government will exercise one, come to the defense table where the defendant will exercise two challenges but the challenges of the Government are covered up under the simultaneous method.

Really we have made the argument that this deprives the defendant of the effective assistance of counsel in jury selection but the Supreme Court has upheld it in the past. Basically the entire process of jury selection takes under an hour, and in one morning, as I set forth in my statement, the district judge in Connecticut can empanel as many as three juries. In Connecticut time has never been a problem and I cannot state too emphatically that time should not be relied upon as any kind of legitimate consideration in reducing the number of peremptory challenges under rule 24. In fact I believe we must go to a system of individual voir dire either conducted by the judge or by the attorneys.

I believe it's preferable to have the attorneys conduct the voir dire because then the attorneys can interact with the prospective venireman,

that is, the attorneys for the Government and the attorneys for the defense, so that the first time that you look at a juror face to face and eye to eye is not at the time of closing argument. I think it's very important to break the ice as early as possible in a criminal trial, especially in Connecticut where we don't even have opening statements as part of the procedure.

Let me give you an example of one of my experiences where individual voir dire was conducted in Connecticut. In September of 1975 we began what is known as the sponge rubber product arson trial which was the destruction of a tremendous factory in the town of Shelton, Conn. It was a crime which received tremendous publicity in the State of Connecticut, a tragic event which put a great many people out of work. Because of the publicity the trial judge conducted an individual voir dire. I will give you just three examples of questions from which I heard answers which I had never heard before as an assistant U.S. attorney and which I have never heard since as a Federal public defender simply because the questions in any other trial I have ever been involved in have been proposed to the entire voir dire panel rather than the individual venireman.

For instance, the question was proposed to the individual venireman, "Can you accept the rule of law that a defendant does not have to testify in his own behalf and is under no burden to produce any evidence?" No less than 12 or 13 panel members speaking alone in the courtroom not encumbered by the presence of 50 or 60 other people stated, "You know, I want to hear if he's got an alibi. I want to hear if he was off gambling someplace. I want to know what he was doing." I mean if you talk to any person on the street they want to know what a person charged with a crime is doing at the time the Government says they were committing a crime. It's a natural reaction. It's a reaction we all have, lawyers and nonlawyers.

Yet, I have never heard anybody respond when the question is propounded to the collective venire panel. Just one indication, but a very important indication to a defendant who is on trial in the United States where he does not have to take the stand in his own behalf. Typically questions of how many people have been victims of crime. Usually you will get a superficial response and that is that people will raise their hands.

District judges, however, go right through—for people to stand up, state their name, what kind of crime was it. People just do not want to bare what could have been a very tragic and traumatic event in the past in the presence of 50 or 60 other people.

Question on the individual voir dire: "Can you accept the rule of law that a defendant is presumed innocent until the Government proves beyond a reasonable doubt that he is guilty?" Invariably on the individual voir dire we got responses, "Well, you know, he wouldn't be here if he didn't do something. I mean they just don't go picking people off the streets." An answer which shows candor and an answer which is uninhibited when a person is asked the question individually. But you do not get any response when the question is propounded collectively. So that I am a fairly firm believer in individual voir dire because if what you are trying to do in selecting a jury is to get an unbiased jury, then you have to know, you have to know who has these

biases, and who will be swayed by certain types of evidence which may not be the most probative and factors which you cannot control as an attorney.

One of the problems we face in Connecticut is the problem with respect to the way the Government has been exercising its peremptory challenges, specifically directed at black veniremen. In Connecticut we typically see very few black veniremen even though in Connecticut according to census figures, the adult population is approximately six percent of the population.

Black veniremen come into court duly qualified and are selected from the voter registration list. They have been excluded in our district to what I would characterize as an alarming extent. In the study conducted by my office—and the statistics are set forth in the statement and also in the district court decision which I have given to counsel prior to my testimony—we found that in 72 trials in the District of Connecticut, in cases involving black or Hispanic defendants, the Government struck 84.8 percent of the available black veniremen. The data showed that in all 72 trials from June 1974 to June 1976, 82 blacks were included in the final group eligible for jury selection and the prosecutors have exercised their peremptory challenge to exclude 69.5 percent regardless of the color of the defendant.

Of 72 trials analyzed, blacks were seated as jurors in only 13 instances and in 10 of these only one black juror was seated. Of 32 trials of minority defendants, either black or Hispanic, in only four of these trials were blacks members of the jury. In Hartford, from June 1974 through June 1976, no black defendant received a verdict, that is guilty or not guilty, from a jury which included a black member. There were 16 trials which were conducted in Hartford.

Part of the problem is the voter registration list. We are just not seeing that many black veniremen. Connecticut uses the voter list as the exclusive source of veniremen. In 1974 in a case in which I represented the Government, the second circuit upheld the exclusive use of voter lists in Connecticut notwithstanding the fact that there was disparity of 5.5 adult black population in the New Haven jury division to 3.3 percent black veniremen which were actually in the jury pool.

However, this underrepresentation which has already been upheld by the second circuit is the context in which we have to view the Government's practice of excluding black veniremen who actually do come to court. Especially in Hartford this is a very alarming phenomenon.

As the committee will see, while the opening of Judge Newman in the district court agreed with our conclusions, the second circuit reversed that decision, recently, when the Government sought a petition of mandamus. It was interesting that the remedy that Judge Newman fashioned was not dismissing of indictment, not to abort any prosecution but merely in that particular case to reinstate four black veniremen otherwise duly qualified who had been struck by the Government.

Ultimately when jury selection resumed, two of those black people became jurors. And when the Court of Appeals reversed they stated that the trial would proceed but those two black jurors would be removed. I believe that despite clear evidence the prosecutors have been striking black veniremen precisely they are black on an unsupported race-biased assumption that they are antigovernment, the practice of exclusion will now continue in Connecticut and has continued.

The invalidity of the assumption that black people are antigovernment or antiprossecution is suggested by the LEAA study I have cited which shows that black people are by far the most frequent victims of violent crime in our country. *Swain v. Alabama*,¹ which is the leading case, and I know you are all familiar with it, dealing with peremptory challenges did not prohibit the striking in any particular case of any venireman on account of race but the statistics in our study, the problem that I believe is presented, lead to the inescapable conclusion that black people in at least Connecticut are being struck for reasons wholly unrelated to the case at issue; that is, no matter who the victim is, no matter what the nature of the crime, they have nevertheless been struck for race-biased reasons.

My conclusion is really that if there is something wrong with the way peremptory challenges are being exercised at least in my district, and that is the frame of reference I present this morning, the problem lies with the prosecution. If the proponents of the amendment feel that a reduction in the number of defense challenges will afford litigants a better cross section of the community, I believe they are in error. It goes without saying such responsibility can be borne by black people as well as white.

As a former prosecutor I am seriously disturbed by what I have seen. As the Federal Public Defender I am voicing the fear and disillusionment of black defendants who are faced with a predominantly white middle-class jury who is to judge their guilt or innocence, not that these people are bad people or that they are bigoted people, but that if there were one black member, the rest of the jurors would have at least the experience of that person to share in reaching a verdict.

Right now, of course, there is a statute, title 28, section 1862, which prohibits a person from being excluded on account of race, creed, economic status. I believe changing the voir dire procedure may be an answer. I believe that if we are trying to discover bias and if we are trying to discover prejudice against a particular defendant, in a particular case, we have to know what is that venireman's thinking. I believe if you have an individual voir dire, if you take a person, a venireman, out of the constraints of the collective body, 50-60 people, he or she is going to tell you how he or she really feels.

When that happens, then people are going to stop striking people on mere appearance and will stop striking people on assumptions which are not valid.

Thank you.

Mr. MANX. Thank you, Mr. Bowman.

Mr. Wiggins.

Mr. WIGGINS. Mr. Bowman, I think I agree with almost everything you say, but I have trouble relating it to the issues before us. With respect to attorney-conducted voir dire, a proposition with which I agree generally, that matter is regulated by rule 24(a), which is not proposed for amendment here. We are dealing with 24(b). So, I am puzzling in my own mind whether we could use this as a springboard for perhaps getting into the subject of 24(a), and I suppose we can, but in fairness to the judges and others we probably ought to notice that for special hearing and take testimony solely on that issue.

¹ 380 U.S. 202 (1965).

But it does, I think, relate somewhat to the 24(b) situation because it must be your view that since you cannot get into the minds of the individual jurors as counsel, that you want greater latitude in exercising your peremptories. I can understand that relationship. But most of your testimony on the peremptory side, the 24(b) side, relates to what you perceive in your district to be a discriminatory practice of the Government in excluding blacks. If that is a fact, of course it's unconstitutional action and conduct by the U.S. attorneys there, but even assuming it to be a fact, I am not so sure that the proposed amendments deal with the problem.

By and large the Government's peremptories remain almost the same, and I presume if they are inclined to exercise those peremptories they will continue to do so under the amendment. What we are talking about here is reduction of yours, that is, the defense peremptories, with which you disagree. In other words, you have portrayed a problem but it is not a problem that I see as directly involved with the rule before us.

Would you comment on it?

Mr. BOWMAN. Well, the problem is this. I have been involved in the criminal justice system since 1971 at any rate. When I hear and am notified that Congress is considering reducing the number of peremptory challenges from 10 to 5, my first reaction in all candor is it is like piling more dirt on a body that's been dead for years. I don't know if Roger Lowenstein gave you the same kind of reaction, but you get the feeling that less and less attention is being paid to the process of jury selection, and these are the people, the jurors, who are deciding the guilt or innocence of people in our country.

You know, many trial lawyers will tell you that by the time jury selection is completed in their cases, the case is half over. I think what we are trying to say is that if you have somebody on that jury who for some reason because of the voir dire process you can't discover if they have a bias or because you don't have enough challenges to be able to remove them from the process and that person has it in his mind they must be guilty of something, no matter what you do or what you say you are not going to get what we think of as a fair and impartial trial, which after all is the object.

Mr. Wiggins, I agree with you that what I say does not go 100 percent toward rule 24, the proposed amendment to rule 24(b). What I am saying is that an amendment to rule 24(b) would be the straw that breaks whatever is left of this camel's back.

We have to know who the people are who are getting on our juries. After all the sixth amendment is there so that a person can have the considered judgment, objective judgment, the fair judgment of 12 men and women. If we are going to give that short shrift and if you want to use this as a springboard for rule 24(a), I could not urge you to do so more strongly. But if you are going to give this process, not you, but if people who are looking at the process are going to give this short shrift, then to put it in light terms. I don't think they know what they are talking about.

Mr. WIGGINS. I suppose we could turn down the proposed changes to rule 24(b) and have all the problems that you describe continue in Connecticut because they have occurred under your present law.

Mr. BOWMAN. That is right.

Mr. WIGGINS. I hope, Mr. Chairman, after we deal with these matters that we won't let this testimony pass by without at least considering the basic assumption and grilling judges because I think they are sort of the problem. They have great flexibility to permit pretty much what they wish in their court with regard to the conduct in examination. For lots of reasons the judges feel that they are better questioners than counsel and they assume that responsibility, even though they would rail against it if they were on the other side of the bench.

Mr. MANN. We do have an interesting paradox here. The rationale of the proposal to change 24(b) is largely that there has been a systematic striking by race.

Mr. BOWMAN. That is right.

Mr. MANN. Or group.

Mr. BOWMAN. That is right.

Mr. MANN. The drafters relied to some extent on *Swain v. Alabama*, which implied something should be done to prevent that from happening. That is their assumption. You think it is going in the other direction, and I tend to agree with you. You have suggested as a means of getting at this problem, that the individual voir dire is perhaps the best way. Do you think that there is any logic at all to such suggestions as proportional juries?

Mr. BOWMAN. Well, you know it is interesting. When the *Jenkins* case,¹ which was the case upholding the voters list as the executive source in Connecticut, was decided it was decided because of the de minimis argument, when you start talking about disparity of 5.5 in the general population to 3.3 in the jury pool you are getting close to a 2-1 disparity, which in a large number of black people would be substantial. But when you stop to talk about how many veniremen it would make a difference with, 6 percent of a 60-person group called in for the average jury selection would mean 3.6 jurors and 3.3 percent of 60 would be about 2 jurors, so what you are talking about on the whole venire is 1.6 jurors.

I think the problem is that proportional representation. I think the Supreme Court decisions are probably right. Maybe I am too much of a student of constitutional law to say that you have to have quotas on juries. I haven't come to that and I don't think that if you have—that an individual jury, that is the number of people in the box, have to reflect the demographic distribution of people throughout the district or throughout the pool. But I think as a starting point they have to at least represent—you have to have at least a similar proportion of people, minority groups in the pool as you do in the demographic population, general population.

I think that a district like Connecticut would be well served to rewrite their plan and supplement even though the courts have said they don't have to because the problems of supplementation to make sure you get a correct proportion at least in the venire panel, never mind in the jury, the problems are where do you go? Do you go to the public housing rolls, do you go to the driver's license bureau? You know, how do you insure that you are actually going to secure more minority group people into the pool and it is a problem we are wrestling with in Connecticut and hopefully will be able to deal with.

¹ *United States v. Jenkins*, 496 F.2d 57 (2d Cir. 1974).

As for proportional juries as such and quotas on particular juries, I haven't come to that although I am not so sure it is a bad idea.

Mr. MANN. Mr. Hall.

Mr. HALL. I would hate to see the day come when we have to have a "mirror of the community" sitting on a jury before the jury was legally constituted. I feel, Mr. Bowman, that you are restricting your testimony to only the State of Connecticut. Having practiced law for a number of years, and usually from the defendant's viewpoint in criminal cases, what you say that has happened in the State of Connecticut has not happened in areas where I have practiced in Texas. It would be impossible to strike the black minority in all those areas in the South because you have nearly an equal mix on your panel of any case you try.

I don't believe this group should be a party in trying to reconstruct rules that might affect a situation in any particular region of this country. My prime concern here is, are these proposed changes taking away any of the rights of a defendant? I asked the question when we had the first session earlier, did any member of the judicial council ever try a lawsuit? I haven't received an affirmative answer yet. I think we have too many situations where a lot of these people are making noise about change who have never been in the pit, who have never tried lawsuits and who have never been at the thrust of a Federal judge with unbridled discretion; in my experience there is not a more dangerous instrumentality known to law.

I noticed in one of these prepared texts on the matter, a question—concerning voir dire—when the attorney desired to ask an appointed juror, "Would you be more likely to believe an agent of the government than other witnesses?" and the judge rephrased it and said, "If I instruct you that you are to give no greater credence to a government agent than to other witnesses, will you be able to follow the instruction?" Well, of course a judge taking over voir dire in such a manner can instruct you out of court in just a few minutes.

Mr. BOWMAN. Absolutely.

Mr. HALL. I don't think that this proposed amendment will benefit the defendant. I desire to have that defendant reaping the benefit of "reasonable doubt" as long as he can. I do not wish to see any of these changes that have been promulgated through the judicial council come out of this committee and go into the statute books because I don't think it helps the defendant. It would be a continued restriction of the rights of a defendant.

I believe one of the last bulwarks in the law today is the fact that a defendant is entitled to a fair trial before a jury of his peers. Whether those peers are black, white, or yellow is immaterial if his lawyer sees fit to strike blacks or whites, for whatever the situation might be. Under your Alabama case he has that right. I know he possesses those rights in the fifth circuit.

Mr. MANN. Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman. I just want to comment about the *Jenkins* case, did you say?

Mr. BOWMAN. Yes.

Mr. HYDE. Involving the validation of the exclusive use of a voters list. I just can't bring myself to think that a person who will not accept the responsibility of registering to vote, when registering to vote

is so easy today and is one of the elementary responsibilities of being a good citizen, is going to be that careful in being a responsible juror. Now you can't prove it either way. I agree.

A person can be a superb juror and not bother to register to vote, I know that, but I want people in the box whether I am defending or prosecuting, who the law means something to them. That means the presumption of innocence as well as the penalty at the end of the law. Someone who can't bother to vote, can't bother to register, doesn't interest me and I don't think it should interest the law.

I don't believe in telephone book juries or gathering the first 12 off the street. I think it takes some responsibility and that you take your job as a juror seriously because it is the toughest job in the world. And someone who can't bother to vote or register to vote, I just don't think they can be a good juror.

Mr. BOWMAN. Mr. Hyde, you know, I am sure I don't have to tell any members of this committee that when the Jury Selection Service Act was amended in 1968 to make voter registration lists the basic source list, that the problem of under-registration was one the Congress recognized. But it doesn't help the defendant. The problem is that if for some reason, and the reason may not be a person's fault at all why he doesn't register, he doesn't become a juror.

There has been a great history the last 10 years of voter registration drives and maybe we are going to see the end of that problem, and I hope we are, of underrepresentation because people are not registered, but it doesn't help the defendant in the dock. The fact that some people out there who are fairminded people and unbiased people are not registering to vote is not helping that defendant who is entitled under the law to a fair cross section of the community. That is what is troubling me.

The arguments have been made, there are many replies, I am not going to lay it off on the fact that, well, if they weren't so disillusioned by government they would be in there to register. I am not going to get into that. I think we all have ideas why people don't register. Some are reasons we can understand and some are reasons we can't.

The problem is the defendant who wants to face a pool of jurors that is representational.

Mr. HYDE. Are you saying a jury panel of people who have registered to vote cannot give a given defendant a fair trial, because they have taken the time to register to vote, therefore they are more establishment than somebody who says, "I can't be bothered with all that jazz, I am not going to bother, my vote doesn't count," that person somehow is going to be a better juror for the defendant, isn't that what you are saying?

Mr. BOWMAN. No. I think what I am saying is that the studies that have been done have shown that blacks typically underregister. It may be the problem of the individual black person, it may not be. I don't know. It is something that has not been answered why. But the fact is that a defendant, white or black, in an individual case under the law, under the Jury Selection and Service Act, has the right to a fair cross section of the community. Let's say hypothetically in a particular community black people are not registering, it doesn't help the problem the defendant faces when he is to be judged by what Congress has

described by a fair cross section of the community. Therefore you have to supplement.

Mr. HYDE. I just submit that the defendant's rights are not greater than the Government's rights and what is really important is the administration of justice, the fair administration of justice. People who can't be bothered to vote, I just question if they can bother to do a conscientious duty as a juror. You and I just disagree there.

Mr. BOWMAN. Mr. Hall, can I just respond to one of your comments, and that was that this problem has occurred in the western district of Missouri and southern district of Louisiana. Those are the two cases which I have cited, the *McDaniels* case¹ and *Nelson* case² in those particular jurisdictions, I have cited in my prepared statement. It's not an isolated problem. I think that I welcome your comments as a person who has tried criminal cases. I think that I welcome your recognition that Federal judges do possess a great deal of power and what they can do in an individual voir dire is question you right out of the courtroom. Without taking too much more time I would just like to say I have seen instances where a person will stand up and say in a bank robbery case, "I was burglarized last month, or you know, my son was the victim of a robbery and my mother had been beaten over the head on the street." Well, nevertheless, madam, are you able to judge this case fairly and impartially even though these things have happened, the juror says yes, they sit down, you go up to the bench and say, "your Honor, I want that juror excused for cause," the judge denies it and that is why you need 10 peremptory challenges because they do have a restrictive practice on granting challenges for cause.

Mr. HALL. I agree with you 100 percent and I don't think there should be any restriction on this voir dire examination we are discussing here.

Mr. MANN. Mr. Evans.

Mr. EVANS. May I conclude from your testimony on this point, although we have had some testimony on some issues which need to be addressed, that we need to change the rule in order to provide a broader cross section for trial in criminal cases, when in fact the peremptory challenges of the State are the challenges which are used to take away this cross section so that there is absolutely no reason for social injustice to be solved by changing this rule. Is that a fair conclusion to be surmised from your statement?

Mr. BOWMAN. You know I am not here to propose that the Government be stripped of its right to exercise peremptory challenges; I am saying that they are abusing them. I don't agree at all with the proposition that in order to provide people with a better cross section of the community that you should reduce the number of peremptory challenges. I believe if the system were to work as it should work and you were to truly define bias and truly define prejudice from the voir dire then people would not be making just race-based assumptions or just be guessing about what particular prejudice a juror may have.

Mr. EVANS. Thank you.

Mr. MANN. Thank you very much, Mr. Bowman.

Mr. BOWMAN. Thank you, Mr. Chairman.

¹ *United States v. McDaniels*, 379 F. Supp. 1243 (E.D. La. 1974).

² *United States v. Nelson*, 529 F.2d 40 (8th Cir. 1976).

STATEMENT OF ANDREW B. BOWMAN, FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF CONNECTICUT

At the outset I wish to thank the chairman and the members of the Committee for affording me an opportunity to share my experience and views concerning the jury selection process in Connecticut federal court and to voice my opposition to the proposed reduction of defense peremptory challenges. From June, 1971, through March, 1974, I served as an Assistant United States Attorney in the district of Connecticut, where I prosecuted federal criminal cases. From March, 1974, through April, 1976, I was in private practice in Bridgeport, Connecticut, doing both civil and criminal litigation in the state and federal courts. In April, 1976, I was appointed the Federal Public Defender for the district of Connecticut.

Since I have been preceded by my fellow federal defenders, Mr. Lowenstein of New Jersey and Mr. Cleary of California, who have shared with you their views concerning the importance and history of the defendants' peremptory challenge and the jury selection process, I would like to focus my comments on certain problems concerning the exclusion of qualified Black veniremen in Connecticut as a result of the exercise of peremptory challenges by the office of the United States Attorney in Connecticut.

Jury selection in Connecticut is the so-called struck jury system. A panel of between 50 and 60 veniremen is summoned by the clerk to the court. Usually more than one jury is selected on a particular jury selection day. After counsel submit written voir dire questions to the judge, the judge makes inquiry of the *entire panel* collectively sitting in the courtroom and in the normal course of events approximately 20 voir dire questions are asked by the judge of the panel. After challenges for cause have been made, the clerk draws from the jury wheel a number of names equal to the jury of twelve plus the number of peremptory challenges allotted to the prosecution and defense. Once the names are drawn each side exercises its challenges, sometimes simultaneously and sometimes on an alternating basis depending upon the judge. The entire process takes under an hour. In one morning a district judge in Connecticut is able to impanel three different juries.

In Connecticut time has never been a problem in my experience, and should not be relied upon as a legitimate consideration for the reduction of the number of peremptory challenges either side may exercise. In fact, individual voir dire of a panel member by counsel preferably, or by the judge would, in my view, provide a substantially better informed basis upon which counsel could intelligently exercise both challenges for cause and peremptory challenges without unduly delaying the jury selection process.

In the Sponge Rubber Products arson trial, which lasted from September, 1975, through February, 1976, the trial judge conducted an individual voir dire of the panel members due to the tremendous publicity which surrounded the case, and the answers of each panel member to the court's questions were far more extensive and unusually candid as compared with the usual collective procedure where panel members are reluctant to stand in the midst of 50-60 other people and bare their respective background and personal opinions.

An extremely serious problem exists in the jury selection process in Connecticut. Black veniremen, duly qualified to serve as jurors, have been excluded from the administration of criminal justice to an alarming extent by the government's exercise of peremptory challenges. In a study conducted by my office, covering the period from June, 1974, through June, 1976, including 12 trials, we have found that in cases involving Black or Hispanic defendants, 33 Negroes were in the final group available for jury selection, and the prosecutors challenged 28, for an exclusion rate of 84.8 percent. The data show that in all 72 criminal trials from June, 1974, through June, 1976, 82 Negroes have been included in the final group eligible for jury selection and that the prosecutors have exercised their peremptory challenges to strike 57 of these for an exclusion rate of 69.5 percent regardless of the race of the defendant. Of the 72 trials analyzed, Blacks were seated as jurors in only 13 instances or 18.1 percent of the time, and in 10 of these only one Black juror was seated. Of 32 trials of minority defendants, in only 4 (12.5 percent) of these trials were Blacks members of the jury. In the Hartford seat of court from June, 1974, through June, 1976, no Black defendant received a verdict from a jury which included a Black member.

Connecticut uses voter registration lists as the exclusive source of veniremen without supplementation. In 1974 the Second Circuit upheld the exclusive use of voter lists notwithstanding the disparity of 5.5 percent adult Black population in the New Haven jury division to 3.3 percent Black veniremen in a case in which I represented the government.¹

However the underrepresentation of Blacks in the jury wheels in Connecticut presents a context which makes the government's peremptory challenge practice with respect to Black veniremen in Connecticut extremely disturbing. While district Judge Jon O. Newman agreed with our conclusions,² the Second Circuit reversed his ruling upon the government's petition for writ of mandamus. Despite clear evidence that prosecutors have been striking Black veniremen precisely because they are Black on the unsupported race-based assumption that Negroes are less likely to convict, the practice of exclusion will now continue at least in Connecticut.³

The invalidity of the assumption that Black people are antigovernment is suggested by a study conducted by LEAA which shows that Black people are themselves the most frequent victims of violent crime.⁴ While the Supreme Court in *Swain v. Alabama*, 380 U.S. 202 (1965) did not prohibit the striking of Black veniremen, *per se*, the statistics in our study lead to the inescapable conclusion that Blacks are being stricken for reasons wholly unrelated to the particular case on trial—a practice not sanctioned by the Supreme Court.

Why should this information be considered by this Committee? Simply because if there is something wrong with the way peremptory challenges are being exercised the problem in Connecticut lies not with the defense but rather with the prosecution. If the proponents of the amendment feel that reduction in the number of defense challenges will afford defendants a better cross section of the community, they are barking up the wrong tree.

Jury service is one of the most important incidents of citizenship. It goes without saying that such responsibility can be borne by Black people as well as White people. As a former Assistant United States Attorney, I am seriously disturbed by what has occurred in my district. As a Federal Public Defender, I am voicing the fear and the disillusionment of my Black clients when they are faced with a middle class all-white jury comprised of people who are from a different culture. As a citizen and a lawyer, I know our jury system can be and must be improved to encompass all of our people who have the qualifications under the Constitution and the statutes of this nation, regardless of race, creed, sex or economic status. See 28 U.S.C. § 1862.

Changing the voir dire procedure as I have previously suggested to an individual rather than collective inquiry would go far toward affording both prosecutors and defendants the opportunity to exercise challenges in an informed and unbiased manner.

Finally, I wish to express my thanks to the chairman, the members of the Committee and the Committee Counsel for affording me and my fellow defenders the opportunity to share with you our experience and our views.

Mr. MANN. Our next witness is Prof. Leon Friedman, who is here on behalf of the American Civil Liberties Union. He teaches law at Hofstra University and has appeared before us in the past.

We appreciate your previous contributions to our work and are happy to welcome you back.

Prof. FRIEDMAN. Thank you.

Mr. MANN. We have your prepared statement, which will be made a part of the record. You may proceed as you choose.

Prof. FRIEDMAN. Thank you, Mr. Chairman.

¹ *United States v. Jenkins*, 496 F.2d 57 (2d Cir. 1974).

² *United States v. Robinson*, 421 F. Supp. 467 (D. Conn. 1976).

³ The problem has appeared in other jurisdictions e.g., *United States v. McDaniels*, 379 F. Supp. 1243 (E.D.La. 1974) (Louisiana); *United States v. Nelson*, 529 F.2d 40 (8th Cir. 1976) (Missouri).

⁴ Criminal Victimization in the United States—comparison of 1973 and 1974. Findings (LEAA, National Criminal Justice Information and Statistics Service, 1976).

TESTIMONY OF PROF. LEON FRIEDMAN, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

Prof. FRIEDMAN. In view of quite considerable testimony on the change in rule 24, I would like to concentrate my remarks on some of the other rules. I will say I certainly endorse Mr. Bowman's remarks and Ms. Bamberger's remarks. I think the reduction in the number of peremptory challenges goes against the purpose of the 1968 Jury Selection Act, and I don't believe it will accomplish the purposes that the Judicial Conference has established for it.

But the rest of my statement indicates our position and I would like to talk about the other three rules which do concern us and concentrate my remarks on them.

Rule 6(e) on grand jury secrecy adds a new sentence defining the term "attorneys for the government" to include besides the persons specified in 54(c): "such other government personnel as necessary to assist the attorneys for the Government in the performance of their duties."

The purpose of the change evidently is to allow technical assistance from other governmental agencies in reviewing grand jury activities. For example, an IRS agent would be allowed to work with the U.S. attorney in reviewing grand jury minutes in a criminal tax investigation or SEC personnel may be included in securities fraud case or an FBI agent could review grand jury testimony.

Evidently existing case law would permit this kind of technical assistance in certain cases as indicated by a recent district court decision which goes into this in some detail. But I think the amendment should make very clear that grand jury minutes are only to be used in a criminal investigation by the Justice Department under the control of a U.S. attorney. Under no circumstances if a SEC agent is involved, for example, should somehow this material be used to assist the SEC or FTC or some other administrative agency in any of their investigations.

The rules on grand jury subpoena and discovery are so broad, the broadest known to the criminal law, and those rules should not be used to assist other governmental agencies who may be somewhat more restricted in the kind of administrative subpoenas that they can put together.

Now, another danger, of course, is that an IRS agent working on a criminal tax investigation may discover all kinds of things which he then can use in a civil tax investigation. Ordinarily, because of the breadth of a grand jury investigation, all kinds of things come within its scope. An IRS agent may say, "Well, I didn't know that, I guess I will start an audit on this person, or this company or this corporation immediately after this grand jury has ceased its operation."

I think it's very dangerous to try and extend this very broad discovery power of a grand jury into other agencies of the Government.

So whether it's a civil tax investigation or administrative investigation, once an IRS agent has been used in the investigation, that there should be some protection against the materials which he discovers being used in some other administrative area.

The rule as such just says that Government personnel shall be allowed to use this, but some caveat should be added. I don't have any

specific language in my prepared statement but I think, I would suggest something like "no other use of the evidence or testimony in the grand jury minutes shall be used by such other Government personnel."

So some protection of that kind, I think, is necessary to go along with what I think the Judicial Conference was trying to do.

Turning now to rule 40.1, removal, the Judicial Conference amendment would change the governing rules of 28 U.S.C. 1443 and in particular they would stop the automatic stay of State court proceedings which are now in effect when a removal petition is filed.

We have two objections to the proposed amendment. One, the time requirements are unrealistic. It has to be done within 10 days after arraignment and that is a very short time for a defendant to secure legal counsel to find out what the ramifications of his case are and to really see what his legal rights are in the situation.

I agree with the Judicial Conference that it shouldn't be done at the eve of trial, but there is no need to have this kind of very harsh limit on a removal petition.

David Epstein, of the American Bar Association, made a recommendation which we would endorse, not later than 15 days before the first scheduled trial date in State court. If you're worried about the eve of trial, there is no reason why 2 or 3 weeks before trial isn't ample protection in the situation.

Second, we strongly object to the fact that there is no automatic stay of State court proceedings. The Supreme Court has made it very tough to win a removal petition. Three decisions in *Georgia v. Rachel*,¹ *City of Greenwood v. Peacock*,² and *Johnson v. Mississippi*³ make it very hard to actually prevail on any removal petition.

In addition, the new rule requires the Federal judge to take a very quick look at the removal petition to see whether there is any validity in it or not. With those kinds of protections, the automatic stay provision should be kept in for the following reasons.

I remember from the old days in the civil rights trials in the early 1960's how important this removal power was. Now, in those days there was an awful lot of misuse of the criminal justice system in order to keep civil rights workers from exercising constitutional rights—people handing out voter information pamphlets, blacks lined up to vote or to register in the southern States, just trying to exercise their constitutional rights. And very often the criminal justice system would be used to thwart those rights.

The response of civil rights attorneys in those times, and I remember doing it in hundreds of cases, was to file a removal petition on the ground that if you arrest someone who is trying to vote, that is—it's clear that he cannot exercise his constitutional rights in the State court system.

The automatic stay in that kind of a provision just froze the situation for a while. It allowed the whole thing to work itself out. It meant that the criminal, the State criminal justice system couldn't go forward. Sometimes cases were remanded. But at least there was an automatic freeze for a while so that the kind of high tension situation wouldn't be allowed to continue.

¹ 384 U.S. 780 (1966).

² 384 U.S. 808 (1966).

³ 421 U.S. 213 (1975).

Now, obviously, those days are gone now. We don't have that kind of practice on a regular basis. But there are still rare situations in which the State criminal justice system breaks down, and if the sheriff in a particular locality thinks of himself as virtually the king in that area and can use the criminal justice system for his own purposes. At least having a Federal court judge look over the situation, even to look it over quickly, and stay the State court proceedings until that very quick overview is made, may serve as a very important check on that kind of a situation.

Again, the proposed rule would provide for this quick check, it provides for certain time limits so that the removal petition wouldn't be misused.

But at the very least you should continue the stay, the automatic stay provision until the Federal judge has a chance to overlook the situation to see whether there is any validity to the removal petition and at that point if he says there is no validity then there is a remand and the system can continue to operate.

But I think retaining this automatic stay provision is a very important check on State criminal justice systems which may break down at times. And there is simply no reason to throw that out in the effort to deal with the removal petitions. They are not being abused to any great extent.

It's possible to take care of the abuses in other areas. It's rare that a valid removal petition is upheld, but I think it does serve the purposes that I have outlined.

Finally, I want to say something about rule 41, the oral search warrant procedure. I have two main comments about that.

No. 1, I think that the standard for using an oral search warrant has to be tightened up. The proposed rule says when it's reasonable to do so. It's not clear exactly what is reasonable. Is it reasonable if a police officer simply doesn't want to take the time to go down to a magistrate on the other side of town in order to get a search warrant, if he is late for work or if he doesn't want to work overtime, is that a reasonable situation to allow the oral search warrant procedure to be effected?

We suggest "demonstrable urgency." If a Federal official can show demonstrable urgency, he may utilize the oral search warrant procedure, and demonstrable urgency means imminent destruction of evidence, the possibility of flight, the need to keep the evidence under surveillance, that someone else may come back to destroy it.

Before this new kind of procedure is established, we think it needs a better triggering point than the one the Judicial Conference has suggested. There are problems with an oral search warrant procedure. If we take the search warrant procedure seriously, the magistrate is supposed to carefully consider a request for a search warrant, should examine the evidence in front of him. He should be able to ask questions about it, he should review the materials in front of him in order to determine whether a search warrant is—should be issued.

Now, if you let all of this be done over a radio or telephone he doesn't have the opportunity to make the kind of searching inquiry that he is supposed to and he can't review the materials in time.

Nevertheless, I think the ACLU has taken the position that perhaps Congress should consider such a procedure for the following rea-

sous. There is a very dangerous trend against using search warrants to secure evidence. The Supreme Court has two cases now in front of it in which the Federal Government is urging them to make the search warrant procedure the exception rather than a rule.

I would like to just point these out to this committee. There is a case now before the Supreme Court, *United States v. Chadwick*, coming out of the first circuit. This involved a warrantless search of a footlocker seized at a train station. What happened was that there was a footlocker being taken by two persons that had been checked across country, there was some talcum powder that had leaked out and the existence of talcum powder is a pretty good sign that it's trying to hide the telltale signs of some kind of contraband, some kind of drugs. So the authorities had a pretty good idea there was something in this footlocker to begin with. Instead of getting a search warrant, they waited until two people came to pick up the footlocker. They took the footlocker, they put it in the car, they were walking away. At that point, they were arrested.

Now, clearly, they could be searched. No issue there. The footlocker was not going to run away. It's very easy for the Government at that point, they certainly had probable cause to think that there was something in there that they could search for. A magistrate would have given them a search warrant in an instant.

Nevertheless, they took the footlocker down to their place of business and then searched it. The first circuit suppressed the evidence. They said under no known exception to the search warrant requirement could you get that footlocker. The Government, in a massive brief, the Federal Government, in a massive brief they just submitted to the Supreme Court, they say that all our learning on search warrants is no good.

In the course of that brief they say the fourth amendment was a mistake. I am not kidding, they really say that the current wording of the fourth amendment was a mistake. It turns out that the certain wording was submitted to the first Congress, and some Congressman named Benson had recommended certain changes, his recommended changes were rejected by Congress, but somehow when it was offered up to Congress for final consideration, his recommended changes mistakenly, accidentally, got put in as the final version of the fourth amendment and Congress voted on the mistaken version of the fourth amendment rather than the one which they really intended.

The change, according to the Justice Department, was that the only thing that Congress was really concerned about was a general warrant. And the fourth amendment was simply designed to protect against overgeneral warrants, writs of assistance for general warrant.

The fourth amendment was not designed to meet with warrantless searches. They are asking the Supreme Court in effect to rewrite the fourth amendment in terms of the original intent of the Congress before Congressman Benson messed up things, and not to deal with warrantless searches at all. They are not unreasonable. A warrantless search, per se, is not unreasonable, and only if the particular search is unreasonable do you have to worry about warrants.

Now, if that is the approach that the Justice Department is taking and urging to the Supreme Court, and if there is any movement in

that direction, then I think the response of Congress is to say we will make it administratively easier for you to get a search warrant, but you must get one. We believe what the Supreme Court has been saying all these years, that the search warrant procedure is—it's a cardinal rule that law enforcement agents must secure and use search warrants whenever reasonably practicable. That is the Supreme Court in the *Trupiano*¹ case, was repeated in *Chimel v. California*² and that really should be the rule.

There are five emergency situations in which search warrants may not be necessary. But the Government is urging the Supreme Court now to throw out that whole approach. If I could just read the heading of one of their arguments, "searches without warrants are not presumptively unreasonable under the fourth amendment." That is the position the Justice Department is urging to the Supreme Court right now. The other case that they have in front of them, *United States v. Ramsey*,³ was a decision out of the District of Columbia Circuit in which a letter, a letter coming through international mail was sitting at the customs office. No one had come to pick it up. It wasn't going to run away. There was some reason to think, someone had smelled something they thought was heroin or felt something was heroin, ample probable cause to secure a warrant.

Nevertheless, customs officials simply opened up the letter without a warrant and of course found some contraband. The District of Columbia Circuit threw out the case. They said there is no exception to the search warrant procedure which applies for international letter mail. If we think that the mail provisions mean anything, they are protected by the fourth amendment. If you think there is probable cause to open the letter, go get a search warrant.

Now, in both of these cases in which the court of appeals suppressed the evidence because there was ample time to get a search warrant if there was probable cause to search—it could have been presented to a magistrate—in both cases this wasn't done and the Supreme Court has taken both of these cases up there.

These two cases, *Chadwick*⁴ and *Ramsey*, maybe the *Stone v. Powell*⁵ cases this term. But I think it's an opportunity for this committee to accept an oral search warrant procedure. As I say, I think there is a quid pro quo that you can get in this situation. I think it needs tightening up as it's currently written, but we are not opposed to it as long as Congress indicates its very strong feeling that if we make it administratively easier for you to get a search warrant you must use it.

And there should be no further exceptions to the requirement for a search warrant. The emergency search warrant rules should be strictly adhered to. The exceptions must be narrowly drawn and those who seek the exemption must show that the emergencies of the situation require that application.

I really feel this change in rule 41 is an opportunity for Congress to say something about this very dangerous trend in limiting the fourth amendment. The fact of the matter is that is the most vital protection

¹ *Trupiano v. United States*, 334 U.S. 699 (1948).

² 393 U.S. 752 (1969).

³ 538 F.2d 415 (D.C. Cir. 1976), cert. granted, Docket No. 76-167.

⁴ 532 F.2d 773 (1st Cir. 1976), cert. granted, Docket No. 75-1721.

⁵ 428 U.S. 465 (1976).

for the privacy and papers of an individual, and the trend away from fourth amendment protection has been a very dangerous question in recent years.

Mr. MANN. Mr. Wiggins.

Mr. WIGGINS. Professor, I gather you're opposed conceptually to the idea of this telephonic authorization for a warrant.

Prof. FRIEDMAN. Conceptually, yes.

Mr. WIGGINS. But you're conceptually for making it easier to get a warrant.

Prof. FRIEDMAN. Right.

Mr. WIGGINS. Do you have some recommendations as to what we might do to make it easier?

Prof. FRIEDMAN. Part of the problem, of course, is the fact that sometimes magistrates are simply not available or judicial officers are not immediately available in some situations.

Mr. WIGGINS. Is that a recognized exigent circumstance justifying—

Prof. FRIEDMAN. No. It is impossible for them to take that position—we have to rethink the whole theory about warrantless searches, that a warrantless search is good if it's reasonable. So, suddenly the whole notion is gone that you most ordinarily search with a warrant and only five recognized exceptions to the warrant requirement will be allowed, I suppose it's like the *Ehrlichmann* case, John Ehrlichmann took the position that he didn't need a warrant to bust into Elspberg's psychiatrist because it was reasonable to look for national security information. I mean it's that kind of thing, that each time a search is made you have to think, is it reasonable under the circumstances.

That is just a very dangerous notion.

Mr. WIGGINS. I understand the reasons for the presumptions of unreasonableness, unless one can remove himself from that presumption. But I am concerned about encouraging police officers and investigators to get warrants, to make it easier for them to do so. I just wonder if you have any practical suggestions, of which this incidentally is one, to make it easier to obtain a warrant.

Prof. FRIEDMAN. Well, the whole theory of the search warrant requirement is that you do have to present it to a magistrate, he does have the opportunity to review what is in front of him, and decide whether a warrant is issued.

I would not shortcut that at all. I think it's necessary for the law enforcement official to come before the magistrate, make his pitch and justify the search he's trying to make.

Mr. WIGGINS. You wouldn't take the position that if the phone was busy that that would justify—

Prof. FRIEDMAN. Oh, that just can't work.

Mr. WIGGINS. You wouldn't take the position that if the agent ran out of dimes that that constituted—

Prof. FRIEDMAN. Absolutely not. I suppose you can make more magistrates available, use State court judges where a magistrate is not available. But make sure that there is that independent judicial overview of the request for a search warrant.

Mr. WIGGINS. I will tell you, it seems to me at the bottom of this is a suspicion on the adequacy of the interrogation by a magistrate of

the person seeking the warrant if it's conducted over a telephone and the sufficiency of record to justify a fair consideration of a motion to suppress later on. Now, that doesn't really attack the whole thing conceptually.

I think we are talking almost about technology rather than concept. If we were able to draft a tight statute which avoided those particular problems, but did not throw out the baby with the bath water, it seems to me that we might be making it easier for officers to get warrants and that really is a very important value we ought to further.

Prof. FRIEDMAN. Absolutely. I agree 100 percent, it's administratively easier to get a warrant then officials will try to get them, and, No. 2, the courts will not read in all kinds of new exceptions to the warrant requirement.

And that is why as I say I think it's possible to get a quid pro quo in this situation. There are some problems with the questioning of someone over a telephone. But I just think that the trend is so dangerous in terms of reading new exceptions in the warrant requirement, and the Justice Department is eagerly pushing in that direction, then I think you know we would be willing to go along with a certain amount of experimentation and looking for other administrative procedures in order to make it administratively easier to get such a search warrant.

Mr. MANN. Mr. Hall.

Mr. HALL. Is it your experience that there is now a problem of some sort for a person to have a warrant issued.

Prof. FRIEDMAN. Well, there are claims about the kind of situation that often comes up, there is the evidence sitting out there, the police officer is afraid that it will be destroyed. If he goes away and leaves the presence of that particular area, that when he comes back with a warrant the evidence is going to be gone. So there has to be some kind of continued surveillance of that particular evidence while he goes off to get a search warrant.

Now, it's true he's going to have to go to a telephone anyhow and it's a question of how much time it takes to make the call.

Mr. HALL. Isn't that the exception rather than the rule?

Prof. FRIEDMAN. Absolutely. In the two cases, *Chadwick* and *Ramsey*, the footlocker was not going anywhere and the letter was not going anywhere. So the kind of situations that are often cited as need for an oral search warrant procedure, imminent destruction of evidence, imminent flight of evidence, that doesn't apply to the situations I have described. In those cases, you know perhaps this is a reasonable method where the police officers have to continue to watch the evidence.

So it's possible for one of them to watch it and someone else to go and get a search warrant before a magistrate, but, you know, I am willing to see there may be some practical problems at times in that kind of a situation.

Obviously, if a magistrate is around to take a telephone call, I suppose he is around to be spoken to as well. So the whole procedure here does not contemplate a midnight situation where there is no magistrate around at all.

I don't know if they want to make a long-distance call to some other place where there may be a magistrate available, I mean there may be some practical savings in getting to a magistrate if you can use a tele-

phone, it's not going to take as long. You may be able to find one where-as you couldn't find one physically as easily.

Even the new procedure contemplates some human contact with the magistrate. If that can't be found, then either it's part of the regular emergency exceptions that now exist or it shouldn't be allowed. I think Congress does have the opportunity to say something about that kind of a procedure.

Mr. HALL. That's all.

Mr. MANN. Mr. Hyde.

Mr. HYDE. I have no questions.

Mr. MANN. Mr. Gudger.

Mr. GUDGER. I would like to hear some comment, I apologize, Mr. Chairman, I had to be at a voting meeting of another committee, some comment about this question of time on voir dire examination of jury. It seems to me that the number of peremptories is not the controlling circumstance which determines the length of time that the voir dire takes. The trial judge himself can direct time and thereby accomplish what the proponents of the reduced number of challenges, peremptory challenges seem to be seeking.

Would you comment on that? To that? You seem in your brief, which I just scanned, to concede that having additional peremptories would only add 10 or 15 minutes' more time to the voir dire. But can't the voir dire be controlled regardless of the number of peremptories?

Prof. FRIEDMAN. It certainly can. I was up in New York when Tony Ulasewicz was tried and I sat through the whole jury selection process, which took an hour and a half. And there were 50 people who were called in on the first panel and Judge Neaher, who is an ex-U.S. attorney and a very good judge, said, "Have any of you ever heard of Tony Ulasewicz before?" and two people raised their hand. Two people.

Now, I just can't believe that. I mean it's just, the newspapers that day were full of Tony Ulasewicz. You couldn't turn on a radio without hearing people talking about another Watergate trial and Tony Ulasewicz is coming by. But jurors did not respond, if a general question is asked en masse to 50 people, they don't respond to it. If you ask them individually, that would be different. But the practice in New York, I know the average time to select a jury, Federal jury in the eastern, southern district, is under 2 hours under the current system.

Mr. GUDGER. May I ask you this? In your New York practice, is the defense counsel supplied with a list of the names of the entire panel as well as those seated in the box, their occupations, anything about their marital status, their place of residence, is that supplied or are you catching these people sort of on the fly with no information whatever about them except what is developed by the Government?

Prof. FRIEDMAN. You do get some information of the people finally seated. You do get the basic information about occupations of the 12 people who are initially seated as the panel. You don't get it of the whole 50.

Mr. GUDGER. You only have those, the information on those actually seated in the box?

Prof. FRIEDMAN. That's correct.

Mr. GUDGER. Now, what is done there with reference to the trial judge restricting the time on voir dire examination? Does he ask questions generally?

Prof. FRIEDMAN. He asks all the questions. You submit questions, proposed questions to him. Then he rephrases them, but he does all the questioning. I don't know of any judge in the eastern or southern district who makes it a practice to permit the lawyers to voir dire. He does it all. And he excludes if you give a list of 30 questions, he may ask 3 out of 30. He says this is all I am required to do and this is all that I do.

So it's very tight control over jury selection system.

Mr. GUDGER. You say in a typical extreme case such as the one you mentioned that only an hour and a half is allowed?

Prof. FRIEDMAN. That is all it took in that case. It could have taken longer. I mean that was a fairly important case and there was a lot of problem about pretrial publicity, but the problem of pretrial publicity was just taken care of by that one question, did any of you ever hear of Tony Ulasewicz?

Mr. GUDGER. Had there been a change of venue on account of newspaper printing?

Prof. FRIEDMAN. No, the assumption was he was known throughout the country. This was in the eastern district, not the D.C. I was just shocked when I heard that. I thought on an individual questioning basis you might have gotten half the jurors to admit they had heard things about him. The judge would have said, "How much do you know?" and there would have been opportunity for some kind of discussion about it. But not when you do it en masse with 50 people there.

Mr. GUDGER. Thank you.

Mr. MANN. Mr. EVANS.

Mr. EVANS. Sir, you seem to think there may be some circumstances or some justification for the type of search, or the type of search warrants anticipated by the change in the rule. Warrantless searches are allowed under the law, are they not?

Prof. FRIEDMAN. They are.

Mr. EVANS. Do you envision any circumstances in which an officer of the law could call a magistrate for a search warrant and not be able to call for assistance from his local unit of police or from another unit to watch the evidence while he went and got a search warrant, or to get assistance to help him do whatever it was he needed to do?

Prof. FRIEDMAN. You have thought up a good argument that hadn't occurred to me. It's probably true, if he could call the magistrate he could call for assistance and someone else could come to guard the evidence against destruction while he goes to get a warrant from the magistrate.

Mr. EVANS. In the event that while he was gone to get the warrant this fellow officer was confronted with the situation of somebody removing the evidence, he would then have reasonable cause to arrest without a warrant or to search without a warrant or whatever?

Prof. FRIEDMAN. Well, there—

Mr. EVANS. Or to seize at least without a warrant which would preserve the evidence?

Prof. FRIEDMAN. He certainly could preserve the evidence in that situation.

Now, again there may be some procedures, some situations where the magistrate may be some distance away and the whole process would be shortened if he could do it with a telephone call.

Mr. EVANS. But we're talking about convenience now, aren't we?

Prof. FRIEDMAN. I agree.

Mr. EVANS. Rather than any failing in our judicial system.

Prof. FRIEDMAN. I agree. I think the ideal thing to do is to reject the proposed oral search warrant proposal and in addition to indicate Congress concern about the ways in which the emergencies or exigencies have been widened beyond their necessity under the fourth amendment.

Mr. EVANS. Over the past I'd say 5, 6, 7 years, in reaction to the *Escobedo*¹ and *Miranda*² method of thinking, have we not gone too far in trying to have justice by convenience or trying to cut out a lot of safeguards in order to help the courts get their business disposed of? Do you see a trend in that direction?

Prof. FRIEDMAN. Well, there is a trend in that direction and it's very dangerous in the fourth amendment area. Here is an area which really does affect every citizen. *Escobedo* and *Miranda* affects police questioning, people in the police station and there are certainly a number of people who are arrested and may be leaned upon psychologically or otherwise.

But fourth amendment protection is for every citizen. The minute you say it's easier for police to break into a house without a warrant and to try and search for evidence, then everyone's privacy is at issue.

Mr. EVANS. Is not the immunity statutes that have been passed going also in this direction?

Prof. FRIEDMAN. Are you talking about the Federal Tort Claims Act?

Mr. EVANS. No. I am taking more of grand jury testimony and granting of immunities to force testimony, to use contempt powers to force testimony. Derogation of fifth amendment rights.

Prof. FRIEDMAN. Absolutely. I mean there are various grand jury reform bills now pending. Perhaps the rule 6(e) proposal might bear on that, but I certainly agree with the thrust of you—

Mr. EVANS. OK. I think we have gotten far afield from what we were talking about, but this change in the rule seems to be just a part of a movement toward this type of thing.

I don't see any need for it.

Prof. FRIEDMAN. My only comment on that is that there is a trend in the courts right now for reading wider and wider exceptions of the fourth amendment warrant requirement.

It's a very bad trend. My concern is how do you stop that?

I agree with Mr. Wiggins that a way to do it is to make warrants administratively easier to secure that courts won't be tempted to read further and further emergencies and widen the exception still further.

So a proposal like this or similar to it with additional safeguards may be desirable if coupled with a very strong congressional statement that we are making it easier to get a search warrant and we mean

¹ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

you have to get it, and no more exceptions to the fourth amendment warrant requirement.

Mr. EVANS. I disagree with that because I think if you can get a warrant for anything, then you are getting back into the very thing that the fourth amendment tries to protect and that is having a reasonable cause before you can search individuals.

Prof. FRIEDMAN. Before you get a warrant. The reasonable cause is before you get a warrant.

Mr. EVANS. But if you make it easier to get a warrant, aren't you in effect saying—

Prof. FRIEDMAN. No, no.

Mr. EVANS. Maybe I am misunderstanding what you're—

Prof. FRIEDMAN. The standards shouldn't be less. I mean the administrative procedures should be easier.

Mr. EVANS. I misunderstood you.

Prof. FRIEDMAN. No, I wouldn't go for that at all.

Mr. MANN. Thank you, Professor.

STATEMENT BY PROFESSOR LEON FRIEDMAN, Hofstra University School of Law,
ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION

On behalf of the American Civil Liberties Union, I appreciate the Committee's invitation and the opportunity to comment on the proposed amendments to the Federal Rules of Criminal Procedure submitted to the Congress by the Supreme Court in April 1976. The American Civil Liberties Union, a nationwide organization with 280,000 members, has been especially concerned about the requirements of due process and the use of fair procedures in the criminal justice system. It welcomes the constant review of the governing rules in the federal system and applauds some of the changes which have been suggested by the proposed amendments. Thus we have no objections to the proposed rule changes in Rules 23 and 50. The main thrust of my remarks today will be with respect to Rules 6(e) on grand jury secrecy, Rule 24 on peremptory challenges, Rule 40.1 on removal and Rule 41 on oral search warrants.

Rule 6(c). Grand Jury Secrecy

Proposed Rule 6(e) makes a change in the current rules by adding a new sentence defining the term "attorneys for the government." These would now include, besides the persons specified in Rule 54(c), "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." The change would allow technical assistance from other governmental agencies in reviewing a grand jury's activities. For example, an IRS agent who is not a lawyer would be allowed to work with a U.S. attorney in reviewing grand jury minutes for a criminal tax investigation. Or SEC personnel may be needed for a securities fraud case. Similarly, FBI agents could review grand jury testimony in conjunction with a U.S. attorney.

Since existing case law generally permit this kind of assistance we believe that the amendment is permissible. However, the amendment should not be understood to permit grand jury minutes to be handed over *in toto* to regulatory agencies, state grand juries or other disciplinary groups for their use. The grand jury is the most efficient method of discovery known to the criminal law. It may investigate in almost any area it chooses, practically anything is relevant to its activities, and it may even consider illegally seized evidence after the recent Supreme Court case of *United States v. Calandra*, 414 U.S. 338 (1975). With such enormous power, restrictions on use of the testimony or evidence are absolutely vital. This committee may choose to defer all consideration on change of the grand jury rules until a full opportunity is afforded to consider the various grand jury reform bills now pending.

In any event no change should be made in the rule that would undermine complete control of the grand jury activities and minutes by the U.S. attorney and the Justice Department for use in an ongoing criminal proceeding by the federal government.

Rules 24. Trial Jurors

The proposed rules would reduce the number of peremptory challenges available to both sides. In a death penalty case, each side would be reduced from 20 to 12 challenges; in felony cases, the defense's challenges are reduced from 10 to 5 and the prosecutions from 6 to 5; in misdemeanors both sides would be reduced from 3 to 2.

We strongly oppose the proposed amendment. We do not believe it is justified in terms of the goals claimed for it by the Judicial Conference, nor for any other reason.

The Advisory Committee Notes suggest three reasons for the change:

(1) The Jury Selection Act of 1968 insures that a fair cross-section of the community will appear on jury panels. It is not necessary to grant many peremptory challenges to accomplish the same purpose.

(2) With many peremptory challenges members of a particular ethnic group will be eliminated more easily.

(3) Reducing the number of peremptory challenges will save court time.

None of these reasons justify the proposed change:

(1) There is still a need to insure that a jury represents a fair cross section of the community. It is often the case that the initial panel has only members of a particular economic or ethnic group and some change in its composition is desirable to meet the purpose of the Jury Selection Act. There is still a need to eliminate potential jurors with bias in a given situation. Since the voir dire in the federal courts is so perfunctory and is handled by the judge, and the opportunities for challenges for cause are so limited, there is little opportunity by the defense to deal with these problems. Peremptory challenges are the least possible means for adequately dealing with the need to insure a fairer cross-section of the community.

(2) It follows that the defense should have at least the 10 challenges now permitted by the rules for felony cases. If the Judicial Conferences is concerned about members of a particular ethnic group being eliminated, the proposed rule changes would hardly solve that problem. If the prosecution was guilty of the practice in the past, it loses only one challenge. If the defense did so—a much rarer occurrence in federal cases—that right should not be undermined in view of the consequences at stake for the defendant.

(3) The change could not possibly save more than 10 to 15 minutes in a criminal trial. The voir dire takes such a short amount of time to begin with that saving five peremptories could not possibly make any significant difference.

Finally it is necessary to point out that equalizing the number of peremptory challenges between defense and prosecution is not necessary. The defense has far more at stake in a criminal trial. The defense and prosecution do not start off on an even footing and there is no reason to make them equal at the challenge stage. The government has the ability to discover much information about potential jury members which the defense cannot match.

Rule 40.1. Removal from State Court

The proposed amendment would change the existing rules on removal to permit prompt disposition of a removal petition. It would also allow the State Court criminal proceeding to continue unless and until the federal court grants a removal petition. In other words there would be no automatic stay of state court proceedings once a removal petition is filed.

We strongly object to the amendments. The time limits are unrealistic and the proposed changes would undermine the protection of 28 U.S.C. § 1443. Besides the changes are unnecessary.

The Supreme Court has established very strict rules on removal in *Georgia v. Rachel*, 384 U.S. 780 (1966); *City of Greenwood v. Peacock*, 384 U.S. 808 (1966) and *Johnson v. Mississippi*, 421 U.S. 213 (1975). It is a rare case now in which removal can be affected.

In view of the strict rules the opportunity for effective removal is slim. However, if there is a substantial basis for removal the state court proceeding should halt while the federal court considers it. I can testify from personal experience as to the importance of the removal power. During the civil rights drive of the 1960's, southern sheriffs would regularly arrest civil rights workers and blacks asserting their constitutional rights. Civil Rights attorneys would immediately remove these cases to the federal courts in order to stop the intimidation through the state criminal justice process. The removal power served as an important

protection of constitutional rights at a time when it was vital to freeze the situation. Obviously times have changed and the same problems no longer occur. But once in a while there is a breakdown in the state criminal justice system and law enforcement officers abuse their power. Where there is over-reaching by particular officials in the state criminal justice systems, it is desirable to allow a federal court to review the situation. The existing federal removal procedure can serve that vital role.

Rule 41. Search and Seizure

The proposed amendment to Rule 41(c) (2) would permit a warrant upon oral testimony. When the circumstances make it reasonable to do so, a federal magistrate may pass upon a request for a warrant transmitted to him on the telephone or presumably through radio. The person making the request is sworn. The request must be transcribed and shall be deemed an affidavit for purposes of the rule. At a later point the person verifies and swears to his oral request.

We have grave doubts whether the oral search warrant procedure adequately protects fourth amendment rights. The magistrate does not have an opportunity to test the credibility of the person seeking the warrant. He will have difficulty making any researching inquiry into the reliability of the facts presented to him since the affidavits often rely upon informant testimony. The magistrate is still further away from first-hand information concerning the reliability of the information.

More important the standard for utilizing the procedure is too lenient. What makes it "reasonable" to make an oral request? If the law enforcement officer doesn't want to travel downtown to a court? If he got up late one day? If he would have to work overtime? There must be demonstrable urgency in any such use of this procedure—such as the imminent destruction of evidence, the possibility of flight and a need to keep the evidence under surveillance.

On the other hand we have noted a very dangerous trend away from search warrants which this provision might help to stop. The Supreme Court has consistently said that: "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants whenever reasonably practicable." *Trupiano v. United States*, 334 U.S. 699, 705 (1948). The fundamental and unwavering principle underlying the Fourth Amendment is that searches conducted without a warrant are "*per se* unreasonable" subject only to narrow exceptions predicated on absolute necessity, such as a search incident to an arrest, a protective pat-down search for weapons, the so-called automobile exception, the plain-view exception or the hot-pursuit exception. Nonetheless, the federal government has recently taken the position that the Fourth Amendment's warrant requirement is the exception rather than the rule. The most recent and blatant example of this is the Brief filed on behalf of the United States in *United States v. Chadwick*, 532 F. 2d 773 (1st Cir. 1976) *cert. granted*, Docket No. 75-1721, involving a warrantless search of a footlocker seized at a train station on probable cause to believe it contained contraband and incident to the warrantless arrest of the apparent owners. The footlocker was not going to run away by itself. There was no danger of its removal and there was ample time to secure a warrant. Nevertheless the Government has urged the Supreme Court to hold that notwithstanding 100 years of Supreme Court decisions to the contrary, warrantless searches are not presumptively unreasonable and that a warrant is never required to conduct a search, even though there may be ample opportunity to obtain one, except for the search of private homes and offices not incident to arrest.

Similarly the government has taken the position in another Supreme Court case, *United States v. Ramsey*, 538 F.2d 415 (D.C. Cir. 1976) *cert. granted*, Docket No. 76-167, that law enforcement officials may open international letter mail without a warrant. In that case a letter was opened by customs officials without a warrant despite the fact that there was no possibility of its removal or disappearance and there was ample time to get a warrant. The Government's argument is that these searches ought to be judged against only the Fourth Amendment's proscription of "unreasonable searches" and that *any* such search is reasonable. The bottom line is that any search which a law enforcement officer believes is necessary is a reasonable search even without a warrant.

Congress should not let this development go by without response. The Fourth Amendment is a vital protection for the privacy rights of all Americans and the warrant procedure is a most important procedure for protecting Fourth Amendment rights. If Congress establishes an oral search warrant procedure, it should

declare its legislative intent (1) that search warrants must be the rule rather than the exception; (2) the recent trend of the cases in widening exceptions to the search warrant rule is disapproved; (3) the exceptions to the warrant requirement must be zealously and narrowly drawn; (4) they should not be extended beyond narrow limits and (5) those who seek the exemption must show that the exigencies of the situation require their application.

Only with this kind of quid pro quo should Congress even consider implementing an oral search warrant procedure.

Mr. MANN. Our next witness is Mr. William Leibovitz, a member of the board of directors of the New York Criminal Bar Association, here representing that association.

Your written statement will be made a part of the record.

You may proceed as you see fit.

TESTIMONY OF WILLIAM LEIBOVITZ, ESQ., ON BEHALF OF THE NEW YORK CRIMINAL BAR ASSOCIATION

Mr. LEIBOVITZ. Thank you.

I am appearing on behalf of the New York Criminal Bar Association. We are an association of attorneys who are actively engaged in the practice of criminal law in the Federal and State courts. The persons I speak for represent a broad range of experience and service throughout the criminal justice system, including some former Federal and State prosecutors as well as former and present public defenders of the indigent, and also those who defend the not-so-indigent.

I want to say I realize the subcommittee has already heard a great deal of comment from speakers on rule 24, but I do ask you to bear with me so that the point of view of our bar association can be made known.

There can be little doubt that a reduction of peremptory challenges as provided in proposed rule 24 is really a negation of our system of trial by jury. In the typical Federal trial where such challenges available to the accused would be reduced from 10 to 5, the prospect of achieving a fair 12-person jury would be effectively canceled. The sixth amendment right to "trial by an impartial jury" simply becomes meaningless without sufficient challenges against potential bias.

Neither the history of our jury system nor its daily operation in the Federal courts would justify this unfortunate encroachment. It is ironic that in 5 months' time revised rule 24 will become law, unless the Congress intervenes, when in fact the weight of legal history, and of practical reality known to those who work in the courts, strongly contradicts the wisdom of this revision.

To begin with, it is germane to ask whether the right to exercise peremptory challenges is actually substantial and necessary, or is it a hollow formality that we should eliminate or alter, as does rule 24, for the sake of so-called expediency.

It will come as no surprise that the Supreme Court has from time to time throughout its history confronted this very question. Speaking for the Court, Justice Byron White has observed: "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Swain v. Alabama*, 380 U.S. 202, 219 (1965). Justice

White added that: "The denial or impairment of the right is reversible error without a showing of prejudice."

In *Swain* the Court describes the use of peremptory challenges as a necessity that is indigenous to the "pluralistic society" of the United States. Such challenges "are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society." The Court expresses its belief that: "the peremptory satisfies the rule that to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

No more pertinent answer can be given to the present revision of rule 24 than the view expressed by an earlier Supreme Court, which said that the peremptory challenge "is," in their words, "one of the most important of the rights secured to the accused * * * Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer v. United States*, 151 U.S. 396, 408 (1894).

The revision of rule 24 is unsupportable not only in principle but in actual practice. In the *Swain* case, the Court aptly noted that the mere close questioning of a juror on voir dire may arouse the juror's resentment. In the absence of sufficient grounds to challenge for cause, the accused may have to exercise a peremptory challenge to remove that hostility.

Consequently, counsel would seriously hesitate to risk the searching questions that might lead to challenges for cause or gamble on challenges for cause which might fail, without peremptories to challenge those jurors. In the words of the Court:

The very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause.

If revised rule 24 was intended to conserve the courts' time by reducing available challenges, that premise is simply erroneous. It would, of course, be untenable to dilute the right of trial by jury as a device for saving time in any event. However, jury selection in Federal court is not a burden on the court's time under present rule 24.

A few weeks ago, in anticipation of this appearance, I decided to compare the experience of knowledgeable Federal court personnel with my own experience in Federal court, which has been that jury selection with few exceptions is streamlined and swift. I spoke with the jury clerk of the southern district of New York, the jury clerk of the eastern district of New York, which are two of the busiest districts in the country, the deputy courtroom clerk of the district judge who is known to have the busiest trial calendar in the eastern district, and finally to an assistant U.S. attorney in the criminal division of the eastern district whose full-time occupation is the prosecution of criminal trials.

I asked each of these persons how long the average jury selection took from beginning to end, in their district courts in the criminal cases with which they have personally dealt. The jury clerk of the southern district informed me that although time varies according to the type and complexity of the case, the average jury selection in the southern district takes, as an outside figure, from 2 to 3 hours.

The jury clerk of the eastern district advised me that jury selection there in criminal trials averages approximately 2 hours, and longer periods are a rare exception.

The assistant U.S. attorney stated that in his trials the total time for jury selection was rarely longer than 1½ hours.

And finally, the deputy courtroom clerk, who observes every jury selection held in his judge's courtroom, informed me that jury selection in his courtroom in criminal cases averages 1½ hours. He also noted that within the past year his judge tried a criminal case in which there were 22 defendants, and the entire jury selection took 1½ hours from beginning to end.

In the rare case where jury selection is lengthy, there usually are special problems that justify and explain it, such as pretrial publicity, complex issues of fact or, in many cases, the reluctance of jurors to serve in a long trial.

So, I respectfully submit to you that there is not and need not be a time problem in jury selection under present rule 24.

It is also very difficult to comprehend how the proponents of revised rule 24 apparently came to believe that a reduction of challenges was necessary to prevent defendants from "systematic elimination of members of a given group from the jury." That conclusion is exactly 180 degrees out of phase. The reverse circumstance holds true; namely, that groups such as nonwhites and others are regularly challenged by prosecutors, rather than by defendants.

Courtroom lawyers know firsthand that nonwhites are often systematically excluded by the prosecution. However, reported cases have also verified it. In the *Swain* case, 26 percent of the community were black but no black juror had served on a trial jury in over a decade. In that trial six blacks were challenged peremptorily by the prosecutor and no blacks served.

In *United States v. Newman*—F. 2d—(2d Cir. Jan. 25, 1977), which is a very recent case, the prosecutor in Connecticut had peremptorily challenged the only four available blacks. The district judge held that discriminatory exclusion of blacks was being practiced by the prosecutor in that Federal district of Connecticut.

While in both of these cases the appellate court found insufficient evidence of systematic discrimination for purposes of defeating the prosecutor's peremptory challenges, there was still clear evidence of concerted exclusion of blacks by prosecutors, whatever their reasons may have been.

In fact, peremptory challenges actually replace challenges for cause which cannot be clearly shown but where some evidence of potential bias exists. In more than two-thirds of all Federal districts the trial judge, rather than counsel, conducts the voir dire examination. Especially in those districts, because of the distance between counsel and juror, it is quite difficult for counsel to demonstrate that a suspected bias is challengeable for cause.

Nevertheless, in jury selection bias is found in many forms and from many sources. Jurors can be prejudiced toward the particular issues of a prosecution; by a defendant's physical appearance; by whether he is on bail or under courtroom guard; by pretrial publicity; by ethnic and racial factors. We confront the same people who vote ethnically and racially in political elections.

Bias emanates from the economic differences between people; from the influence of one's occupation or that of a relative; from political views; from having been the victim of a crime; from previous jury service; from conceptual differences with such principles as presumption of innocence, burden of proof, and reasonable doubt.

Potential jurors are often too compliant to resist the aura of governmental authority; or too dull-minded to absorb the issues of fact and follow the law; or too timid or fearful to assert their views in the jury room.

All of these factors and many more enter into the equation of selecting a fair and impartial jury. And these are among the practical necessities of our jury system which revised rule 24 appears to ignore.

Experience tells us that the peremptory challenge is the lifeblood of an impartial jury. Jurors do not readily admit biases openly, and a challenge for cause is rarely achieved. The fact is that a trial judge has such broad discretion to reject a challenge for cause that such challenges are just not dependable as an ultimate means of excluding bias.

One graphic example occurred in *Frazier v. United States*, 335 U.S. 497 (1949), a case often cited by other courts as authority for refusing challenges for cause. In *Frazier* a majority of the Supreme Court rejected the validity of a challenge for cause by the accused whose jury was comprised entirely of Government employees, including one juror and the wife of another juror who were employed by the same Federal agency charged with enforcing the law which the accused had supposedly violated.

The dissenting opinion of Justice Jackson, with understated recognition of a trial lawyer's pained view of that result, said: "On one proposition I should expect trial lawyers to be nearly unanimous: That a jury, every member of which is in the hire of one of the litigants, lacks something of being an impartial jury."

I should like to assure you that the law reports abound with other cases in which Federal courts have refused to sustain challenges for cause to jurors whose potential for bias was apparent. Some of the modern court cases in which jurors were found not challengeable for cause included the following:

A prospective juror stated that he would give more credibility to an FBI agent than to any other witness. That was found to be not challengeable for cause.

In another case jurors learned of a defendant's past felony convictions which were not admissible since the defendant did not testify. The jurors claimed they would not consider that information in their verdict.

In a prosecution for armed bank robbery the court approved as jurors three persons who included the wife of a bank official, a former police officer, and the wife of another police officer.

In still another case a juror was the brother of a U.S. Marshal of the same court where the trial was being held.

Finally, two jurors had sat on the jury in a previous similar case in which some of the same prosecution witnesses also testified.

The *Frazier* case and all of these other cases, in my view, demonstrate that even reasonable judges are often unaware of or insensitive

to the realities of jury biases, which the accused and his lawyer are able to recognize, perhaps because of their close relationship with and knowledge of the case. In the face of this reality, the accused should not be rendered helpless to remove potential bias because of insufficient available peremptory challenges.

Moreover, rule 24 should, if anything, be changed to allow the defendant more challenges than the Government in every instance, rather than equal challenges. Legal precedent strongly supports a greater number of challenges for the defendant. As recently as January of this year the U.S. Court of Appeals for the second circuit recognized that when it said:

The right to peremptory challenges is of great importance, both of the Government and to the defendants—but mostly to the defendants, because they are personally involved in the result of the trial and for this reason usually have more of the peremptory challenges than the Government. These challenges provide one of the most effective assurances that a party will have a fair and impartial jury.

A larger number of jury challenges for the defendant is but a small concession for the imbalance of power between him and the Government. As to the reason for trial by jury, the Supreme Court has said in the well-known case of *Duncan v. Louisiana*, and I quote: "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."

It is, therefore, absolutely consistent with the purpose of trial by jury, as a protection against Government, that the defendant have more available challenges than the Government.

The fact that revised rule 24 would allow the defendant additional challenges, in the court's discretion, could never compensate for the proposed reduction of challenges. In matter of jury selection the court so often resolves its discretion against the defendant, as in the case of challenges for cause.

And for similar reasons we oppose that provision which empowers the court to increase the Government's challenges. Again, the jury trial was meant to protect the accused against the mighty powers of the Government. The Government needs no more power or advantage than it already has.

We also oppose the new provision that a request for additional challenges be made no later than 1 week before trial. The grounds of a request for additional challenges may well arise during jury selection itself. The defendant should be allowed to request more challenges at any time during jury selection.

I might also point out that the proposed required motion would proliferate motion practice before the Federal courts, which is precisely what courts have wanted to diminish.

We ask, then, that you, the Congress, act now to prevent the curtailment of peremptory challenges which the revised Federal rule will, otherwise, bring about. The new rule, quite simply, would render almost meaningless the word "impartial" in the sixth amendment phrase "trial by an impartial jury."

My colleagues and I urge you not to let that happen.

Mr. MANX. Thank you, Mr. Leibovitz.

Mr. Wiggins?

Mr. WIGGINS. No questions.

Mr. MANN. Mr. Hall.

Mr. HALL. No questions.

Mr. MANN. Mr. Hyde?

Mr. HYDE. No other than to compliment the witness on an excellent statement. I couldn't find a thing to disagree with.

Mr. MANN. Mr. Gudger.

Mr. GUDGER. I would like to ask a general question, Mr. Leibovitz. This precedent that you have in your statement in the Federal courts of requiring that all voir dire questions be posed by the trial judge seems to me to militate for the need of greater number of peremptory challenges, that is the practice that probably would be the necessity where trial counsel himself, defense counsel himself, gets to question the juror for determination of bias, thereby bringing the matter into a for cause circumstance.

Now, how long has it been since New York allowed trial counsel to participate in the voir dire?

Mr. LEIBOVITZ. I heard the previous speaker say that no judges allow that.

I think on very, very rare occasions in New York, certain judges have experimented with it. The last one I know who did in the eastern district stopped it last year.

I don't know when the practice was instituted.

I do know though that the inability of counsel to speak directly to the prospective juror is a very defeating procedure because what it really does is to preclude the attorney who has knowledge of the case from posing the questions in a meaningful way.

Some judges do accept questions and ask them in the words of counsel.

But even the changing of a word here or there can make a very serious difference.

I don't know the answer to when that practice was instituted. I may say, however, that you stated that in those districts where counsel do speak directly to the juror, maybe less challenges would be necessary.

In State courts, we examine jurors directly. It doesn't diminish the need for peremptory challenges, it merely increases the chance to expose bias.

Mr. GUDGER. For cause can be asserted.

Mr. LEIBOVITZ. Yes.

Mr. GUDGER. You mention this *Frazier* case in the transcript, and I am not familiar with it, page 8. Was this a challenge to the array or to each individual juror, this being the case where it seems everyone on the panel had some employment connection with the U.S. Government?

Mr. LEIBOVITZ. I believe that challenge was made for cause to the entire 12 seated jurors.

Mr. GUDGER. Not on a breakdown, individual by individual?

Mr. LEIBOVITZ. I don't believe it was. I think what happened was that counsel was suddenly aware that he had a jury of 12 Government employees, including the ones I mentioned who were working for the Agency involving the law that was being prosecuted. He suddenly realized that he couldn't go on and try to get through that situation without a challenge for cause.

Mr. GUDGER. Did the majority opinion, and I am not familiar with the case, hold that he had not protected his challenge because he had not made it an individual by individual cause.

Mr. LEIBOVITZ. I believe that to some extent they did. But their opinion was nevertheless decided sufficiently on the merits so that the four dissenters who included Justice Frankfurter, as well as Jackson, I believe, felt that the majority opinion had overlooked the basic problem of defense counsel's effort to secure a neutral jury in this case, which, to say the least, could not have been had under those circumstances.

Mr. GUDGER. Is it your opinion, counselor, that given a situation where there is an imbalance, and you suggest an imbalance if the State, the Government and defense have equal challenge, equal number of challenges, is it your contention that defense counsel, confronted with that problem, is forced then into a position of utilizing more motions, seek changes of venue and such devices to protect himself?

Mr. LEIBOVITZ. Very much so; I think what will happen if the revised rule takes effect is that counsel will be forced, as they have never been before in my experience, to begin not only the kind of motion practice you have referred to, but they will increase by a great deal the amount of time it takes to select a jury because they will have to use the last ditch effort of trying to elicit enough information to establish that challenge for cause.

And the only way that can be done is by submitting tons of questions to the court and making a record if the court refuses to ask those questions. I think that will immeasurably increase the time of the court.

Mr. GUDGER. So, it is your contention that, rather than the reduction of challenges and equal balance of challenges having the effect of reducing time in trial, it is going to have an overall impact to the exact reverse?

Mr. LEIBOVITZ. That is my opinion, and it is the opinion of most experienced trial counsel I have spoken with.

Mr. GUDGER. That would be time both on motions practiced before trial, motions to suppress and other matters would be pursued more diligently and your practice during the trial in trying to make sure that your voir dire is exhaustive?

Mr. LEIBOVITZ. Absolutely.

One thing, if I may add this, is that counsel will request hearings in which the court will be asked to conclude that special circumstances exist, where these additional challenges are absolutely necessary. That, in itself, could be as long as the entire jury selection.

Mr. GUDGER. Thank you.

Mr. MANN. Mr. Evans?

Mr. EVANS. I have no questions, Mr. Chairman.

Mr. MANN. Thank you very much. We appreciate your appearance here.

**STATEMENT OF WILLIAM LEIBOVITZ ON BEHALF OF THE NEW YORK CRIMINAL
BAR ASSOCIATION**

Honorable Chairman and honorable members of the subcommittee: My name is William Leibovitz. I am appearing on behalf of the New York Criminal Bar Association on whose board of directors I serve.

We are an association of attorneys who are actively engaged in criminal law practice in the Federal and State courts. The persons I speak for represent a broad range of experience and service throughout the criminal justice system, including some former Federal and State prosecutors as well as former and present public defenders of the indigent, and also those who defend the not-so-indigent.

There can be little doubt that a reduction of peremptory challenges as provided in proposed rule 24 is really a negation of our system of trial by jury. In the typical Federal trial where such challenges available to the accused would be reduced from 10 to 5, the prospect of achieving a fair 12-person jury would be effectively cancelled. The sixth amendment right to "trial by an impartial jury" simply becomes meaningless without sufficient challenges against potential bias.

Neither the history of our jury system nor its daily operation in the federal courts would justify this unfortunate encroachment. It is ironic that in five months' time revised Rule 24 will become law unless the Congress intervenes, when in fact the weight of legal history, and of practical reality known to those who work in the courts, strongly contradicts the wisdom of this revision.

To begin with, it is germane to ask whether the right to exercise peremptory challenges is actually substantial and necessary, or is it a hollow formality that we should eliminate or alter, as does Rule 24, in the name of expediency?

It will come as no surprise that the Supreme Court has from time to time throughout its history confronted this very question. Speaking for the Court, Justice Byron White has observed: "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Sicain v. Alabama*, 380 U.S. 202, 219 (1965). Justice White added that: "The denial or impairment of the right is reversible error without a showing of prejudice" (at p. 219), which the Supreme Court had previously declared in 1892 in *Lewis v. United States* (146 U.S. 370, 376).

In *Sicain* the Court describes the use of peremptory challenges as a necessity that is indigenous to the "pluralistic society" of the United States. Such challenges "are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society" (at p. 218). The Court expresses its belief that: "the peremptory satisfies the rule that 'to perform its high function in the best way justice must satisfy the appearance of justice.'"

No more pertinent answer can be given to the present revision of Rule 24 than the view expressed by an earlier Supreme Court, which said that the peremptory challenge "is one of the most important of the rights secured to the accused Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer v. United States*, 151 U.S. 396, 408 (1894).

The revision of Rule 24 is unsupportable not only in principle but in actual practice. In *Sicain v. Alabama*, *supra*, the Court aptly noted that the mere close questioning of a juror on voir dire may arouse the juror's resentment. In the absence of sufficient grounds to challenge for cause, the accused may have to exercise a peremptory challenge to remove that hostility. Consequently, counsel would seriously hesitate to risk the searching questions that might lead to challenges for cause, or gamble on challenges for cause which might fail, without peremptories to challenge those jurors. In *Sicain v. Alabama* the Court concluded that:

"[The] very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause." (Pp. 219-220).

If revised Rule 24 was intended to conserve the court's time by reducing available challenges, that premise is erroneous. It would, of course, be untenable to dilute the right of trial by jury as a device for saving time in any event. However, jury selection in federal court is *not* a burden on the court's time under present Rule 24.

A few weeks ago I decided to compare the experience of knowledgeable federal court personnel with my own experience in federal court, which has been that jury selection with few exceptions is streamlined and swift. I spoke with the Jury Clerk of the Southern District of New York, the Jury Clerk of the Eastern District of New York, which are two of the busiest districts in the country, the deputy courtroom clerk of the district judge who is known to have the busiest

trial calendar in the Eastern District, and finally to an Assistant United States Attorney in the Criminal Division of the Eastern District whose full-time occupation is the prosecution of criminal trials.

I asked each of these persons how long the average jury selection took from beginning to end, in their district courts in the criminal cases with which they have personally dealt. The Jury Clerk of the Southern District informed me that although time varies according to the type and complexity of the cases, the average jury selection in the Southern District takes 2-3 hours.

The Jury Clerk of the Eastern District advised me that jury selection there in criminal trials averages approximately 2 hours, and longer periods are a rare exception. The Assistant U.S. Attorney stated that in his trials the total time for jury selection was rarely longer than 1½ hours. The deputy courtroom clerk, who observes every jury selection held in his judge's courtroom, informed me that jury selection in his courtroom in criminal cases averages 1½ hours. He also noted that within the past year his judge tried a criminal case in which there were 22 defendants, and the entire jury selection took 1½ hours.

In the rare case where jury selection is lengthy, there usually are special problems that justify and explain it, such as pretrial publicity, complex issues of fact or the reluctance of jurors to serve in a long trial.

I respectfully submit to you that there is not and need not be a time problem in jury selection under present Rule 24.

It is also very difficult to comprehend how the proponents of revised Rule 24 ever came to believe that defense attorneys, rather than prosecutors, tend to challenge nonwhite jurors. That conclusion is exactly 180 degrees out of phase. The reverse circumstance holds true, namely, that nonwhites are regularly challenged by the prosecution.

Courtroom lawyers know firsthand that nonwhites are often systematically excluded by the prosecution. However, reported cases have also verified it. In *Swain v. Alabama*, *supra*, 26% of the community were black but no black juror had served on a trial jury in over a decade. In that trial 6 blacks were challenged peremptorily by the prosecutor and no blacks served.

In *United States v. Newman*, — F. 2d — (2d Cir. Jan. 1977), the prosecutor had peremptorily challenged the only 4 available blacks. The district judge held that discriminatory exclusion of blacks was being practiced by the prosecutor in that federal district of Connecticut.

While in both of these cases the appellate court found insufficient evidence of systematic discrimination for purposes of defeating the prosecutor's peremptory challenges, there was still clear evidence of concerted exclusion of blacks by prosecutors, whatever their reasons.

Peremptory challenges actually replace challenges for cause which cannot be clearly shown but where some evidence of potential bias exists. In more than two-thirds of all federal districts the trial judge, rather than counsel, conducts the voir dire examination. Especially in those districts, because of the distance between counsel and juror, it is quite difficult for counsel to demonstrate that suspected bias is challengeable for cause.

Nevertheless, in jury selection bias is found in many forms and from many sources. Jurors can be prejudiced towards the particular issues of a prosecution; by a defendant's physical appearance; by whether he is on bail or under courtroom guard; by pretrial publicity; by ethnic and racial factors (we confront the same people who vote ethnically and racially in political elections).

Bias emanates from the economic differences between people; from the influence of one's occupation or that of a relative; from political views; from having been the victim of a crime; from previous jury service; from conceptual disagreement with such principles as presumption of innocence, burden of proof, and reasonable doubt.

Potential jurors are often too compliant to resist the aura of governmental authority; or too dull-minded to absorb the issues of fact and follow the law; or too timid or fearful to assert their views in the juryroom.

All of these factors and many more enter into the equation of selecting a fair and impartial jury. These are among the practical necessities of our jury system which revised Rule 24 appears to ignore.

Experience tells us that the peremptory challenge is the lifeblood of impartial jury selection. Jurors do not readily admit biases openly, and a challenge for cause is rarely achieved. The fact is that a trial judge has such broad discretion to reject a challenge for cause that such challenges are just not dependable as an ultimate means of excluding bias.

One graphic example occurred in *Frazier v. United States*, 335 U.S. 497 (1949), a case often cited by other courts as authority for refusing challenges for cause. In *Frazier* a majority of the Supreme Court rejected the validity of a challenge for cause by the accused whose jury was comprised entirely of government employees, including one juror and the wife of another juror who were employed by the same federal agency charged with enforcing the law which the accused had supposedly violated.

The dissenting opinion of Justice Jackson, with understated recognition of a trial lawyer's pained view of that result, said: "On one proposition I should expect trial lawyers to be nearly unanimous: that a jury, every member of which is in the hire of one of the litigants, lacks something of being an impartial jury." (At p. 514.)

I should like to assure you that the law reports abound with other cases in which federal courts have refused to sustain challenges for cause to jurors whose potential for bias was apparent. Some of the cases in which jurors were found not challengeable for cause included the following:

A prospective juror stated that he would give more credibility to an FBI agent than to any other witness. *United States v. Cross*, 474 F.2d 1045 (5th Cir. 1973).

Jurors learned of a defendant's past felony convictions which were not admissible since the defendant did not testify. The jurors claimed they would not consider that information in their verdict. *Murphy v. Florida*, 363 F.Supp. 1224 (S.D. Fla. 1973), *aff'd*, 495 F.2d 553.

A juror said he perhaps had some prejudice against defendant's attorney, but would be fair. *Bateman v. United States*, 212 F.2d 61 (9th Cir. 1954).

In a prosecution for armed bank robbery the court approved as jurors three persons who included the wife of a bank official, a former police officer and the wife of another police officer. *Mikus v. United States*, 433 F.2d 719 (2d Cir. 1970).

A juror was the brother of a U.S. Marshal of the same court where the trial was being held. *United States v. Gerhart*, 275 F.Supp. 443 (S.D. W.Va. 1967).

Two jurors had sat on the jury in a similar case in which some of the same prosecution witnesses also testified. *Government of Virgin Islands v. Williams*, 478 F.2d 771 (3d Cir. 1973).

These cases and *Frazier v. United States*, *supra*, (all jurors were government employees) in my view demonstrate that even reasonable judges are often unaware of or insensitive to the realities of jury biases, which the accused and his lawyer are able to recognize, perhaps because of their close relationship with and knowledge of the case. In the face of this reality, the accused should not be rendered helpless to remove potential bias because of insufficient available peremptory challenges.

Moreover, Rule 24 should, if anything, be changed to allow the defendant *more* challenges than the Government in every instance, rather than equal challenges. Legal precedent strongly supports a great number of challenges for the defendant. As recently as January of this year the U.S. Court of Appeals for the Second Circuit recognized that:

"The right to peremptory challenges is of great importance, both to the Government and to the defendants—but mostly to the defendants, because they are personally involved in the result of the trial and for this reason usually have more of the peremptory challenges than the Government. These challenges provide one of the most effective assurances that a party will have a fair and impartial jury." *United States v. Newman*, *supra*, at n. 8.

A larger number of jury challenges for the defendant is but a small concession for the imbalance of power between him and the Government. As to the reason for trial by jury, the Supreme Court has said: "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). It is, therefore, absolutely consistent with the purpose of trial by jury, as a protection against Government, that the defendant have more available challenges than the Government.

The fact that revised Rule 24 would allow the defendant additional challenges, in the court's discretion, could never compensate for the proposed reduction of challenges. In matters of jury selection the court so often resolves its discretion against the defendant, as in the case of challenges for cause. And for similar reasons we oppose that provision which empowers the court to increase the Government's challenges. Again, the jury trial was meant to protect the accused against the mighty powers of the Government. The Government needs no more power or advantage than it already has.

We also oppose the new provision that a request for additional challenges be made no later than one week before trial. The grounds of a request for additional challenges may well arise during jury selection itself. The defendant should be allowed to request more challenges at any time during jury selection.

We ask, then, that you the Congress act now to prevent the curtailment of peremptory challenges which the revised Federal Rule will otherwise bring about. The new Rule, quite simply, would render almost meaningless the word "impartial" in the Sixth Amendment phrase "trial by an impartial jury." My colleagues and I urge you not to let that happen.

Mr. MANN. Our next witness is Prof. Melvin Lewis of the John Marshall Law School in Chicago. He has appeared before this subcommittee several times, most recently in connection with the habeas corpus rules.

We appreciate your previous contributions to the committee, Mr. Lewis.

Mr. LEWIS. Thank you.

Mr. MANN. Your statement will be made part of the record.

You may proceed as you wish.

TESTIMONY OF PROF. MELVIN B. LEWIS, THE JOHN MARSHALL LAW SCHOOL, CHICAGO, ILL.

Prof. LEWIS. Thank you. I am very grateful for the opportunity to contribute my views to your present deliberations.

I am very, very sensitive to the thoughts articulated a little earlier by Mr. Hall. I find myself in total agreement with his impatience toward those who would predicate a discussion of legal procedure upon a background which lacks meaningful time in the pits. I find his reaction really rather pallid alongside my own because of the fact that I am required to deal with such persons much more frequently than I would like.

I do not ask your attention on the basis of the title "professor." I do not believe that in this forum it implies any claim to consideration. It is a title which I believe certainly anybody on the rostrum and probably anybody in the room with the sole exception of the otherwise talented gentleman to my immediate left, could have tomorrow morning for the asking.

I seek your attention more because of the fact that I have indeed spent better than 23 years in the pits prior to obtaining my present exalted status in the ivory tower; and I think that there may be one of your group who could vouch for that fact.

Mr. HYDE. Yes, I have tried, I don't know if we have ever tried any cases, but Mr. Lewis is known as a very fine trial lawyer in the Chicago area.

Prof. LEWIS. That is very kind of you.

Mr. HYDE. We may have opposed each other, I don't know. If we did, I'm sure I lost.

Prof. LEWIS. If that had happened, sir, I should very much regret it. [Laughter.]

I have said most of what I have to say in my written presentation in terms of a formal statement on the issues involved here.

But the point that I would make to this committee and make very forcefully is this. If you were to seek an environment in which a procedural safeguard provision is not susceptible to abuse, I think you

would have to go to martial law. Short of that, any procedure which the mind can conceive could be abused. And accordingly, if there were to be presented to this body a series of documented abuses with regard to any procedural safeguard, I would hope that the reaction of this body would be to take such steps as might be necessary to obviate those abuses.

But what has been presented to this body overall is a laundry list of potential abuses with few, if any, documented instances in which such abuses have occurred. This body is asked to forestall the possibility that such abuses might occur by revising statutes in some cases, and rules of procedure in others, which have been operative for decades without generating meaningful complaint.

This body has heard some very forceful discussion of rules 6 and 24. I am advised that there is yet one additional very forceful and exceptionally well reasoned critique of the voir dire limitations which will yet be brought before this body.

Accordingly, with your indulgence, I would like to emphasize the other questions which have been commended to you by the Judicial Conference. I would first turn if I might to rule 23, which provides essentially that in a criminal case, there shall be a right to findings of fact only if such findings are requested in advance of the general finding.

The question becomes immediately, what is evil is sought to be remedied here? What is sought to be accomplished, what is the purpose behind such a proposal?

Fundamentally, a trial lawyer in deciding whether to take a bench or a jury trial is faced with the following choice. If he takes a jury trial, there will be memorialized for a reviewing court precisely the principles of law which were applied in that trial through the form of jury instructions.

On the other hand, if he takes a bench trial, while the principles of law which were applied in reaching the determination will probably not be memorialized, nonetheless he will have for the reviewing court if it should come to that a statement of the factual findings to which the law was applied.

The proposal before you would obviate that right, and I can only ask again, to what purpose? There is nothing onerous about the entry of findings of fact in a bench trial. Nothing onerous about it at all.

When the judge enters a general finding he knows precisely or should know, what facts he is proceeding. A statement of considerably less than 5 minutes made orally from the bench, transcribed by the court reporter, satisfies the requirement of findings of fact.

There is no suggestion before this body that that procedure ever has been abused or indeed that it is susceptible of abuse.

In the face of that, this body is told that it must present criminal defendants with the unconscionable dilemma of either waiving their right to such findings or of saying to the judge in advance, "I confess to you that I reasonably expect to be found guilty here. Otherwise I would have no cause for findings of fact."

The only purpose of factual findings is to provide the reviewing court with a statement of the basis upon which the trial judge acted. Under the proposed rule, an accused must either admit that he believes

he will need appellate review, or, in the view of the draftsman of the proposal before you, he has waived that right.

I very sincerely believe that there is quite literally nothing to be said in support of that concept. Certainly, if there is any rational basis for such a proposal that basis has not been articulated by the proponents of this rule.

The communication given to this body contains a meaningful citation only to the *Rivera* case. In *Rivera*, you are told, the request was not made until the sentence has been imposed. Technically that is true. *Rivera* was a 2-day trial. On the second day the defendant was found guilty and sentenced. The following day he was brought back because there had been some irregularity incident to his sentencing.

And at that time he requested findings of fact. This is hardly what any rational person could call an imposition on the court. Particularly when we consider, gentlemen, that the civil litigant is entitled to this as a matter of right without asking. It's his. Any civil litigant has the absolute right, without any request to findings of fact on the part of the trial judge.

I can conceive of no rational basis upon which the much more heavily impacted criminal defendant should be denied the same right.

Turning now to 40.1, the procedure for removal. This again is a solution in search of a problem. But the most serious aspect of this proposal in my judgment is its format and the manner in which it comes before this group.

40.1 would accomplish a collateral repeal of a congressional statute. The statute, title 28, United States Code, section 1446(c), provides flatly that a removal petition may be filed at any time prior to trial. Congress considered that statute in terms of amendment in 1965 and the revisers' note in the United States Code Annotated discussing the action taken by the Congress at that time preserving the right to file a removal petition at any time before trial, leaves no doubt that the congressional action was deliberate.

In the revisers' words, this provision was retained "to protect Federal officers enforcing revenue or criminal laws from being rushed to trial in State courts before a petition for removal could be filed."

This is what the Congress then had in mind. Now, if the Congress was mistaken on this, and I don't believe it for a second, but if it was, the proper forum for remedial action would seem to me to be the legislative process with the kind of input and discussion which this proposal today receives. But that has occurred only fortuitously, only because there were those among you who were sufficiently vigilant to be able to take a delaying action within the incredibly short time between the transmission of these proposals and the time when they would otherwise have become effective at the conclusion of a legislative session, during a presidential election year.

We are now considering the proposal. It could be argued that no damage therefore has been done. But if one were to be as preoccupied as apparently are the sponsors of these proposals with the potential for abuse, then one could not ignore the circumstances of the transmission of this attempted repeal of a statute.

I urge to this body that congressional statutory consideration and the judicial rulemaking power are not simply two alternative methods of achieving legislation.

The rulemaking power properly addresses itself to considerations of procedure. What we have here is effectively a statute of limitations and one whose restrictions may fairly merit the term "unreasonable."

On the substance of this proposed rule, let me say first that there are many districts in which a trip to Federal court involves a day's hard ride. In the Chicago area, I have tended to become spoiled and accustomed to the notion that the Federal court is 5 minutes away. But it's been very forcefully impressed upon me in other contexts that that simply is not true in a great many portions of the country.

And if in fact those few petitioners, and I emphasize "few," who believe that they have a bona fide cause for removal, are to be subjected to a 10-day limitation during which under the terms of this proposal they could further be impacted within the State court with demands for discovery, with deadlines for the filing of motions, indeed, with the actual commencement of trial, what we could have here would be quite literally a means of subversion of the very remedy itself.

I would also point out to this body that the very vast bulk of removal petitions are filed on behalf of Federal officers.

There has been cited within the transmission to this committee a law review article which is entitled, if memory serves, "Abuse of Procedure of Removal in State Criminal Prosecutions."

That is rather a grim title. It implies a fairly pandemic misuse of a remedy. Knowing that no such assertion would be factually supportable, I took the trouble to look up that article.

And I suppose the one item of usefulness that I could now have as an academician, would be to serve as a reviewer of that piece of writing. I would point out to this body that although the law review article in question is entitled "Abuses of Procedure in Removal of State Criminal Prosecutions," the only instance of abuse which is cited within that article relates to a civil case, and civil removal would in no way be impacted by the proposal before this body.

More than that, the claim of abuse in that case, while tenable, certainly is not nearly so grave as the writer would suggest.

A note of that kind is generally entrusted to an undergraduate somewhere around his third semester in law school. And in reviewing the article in question, I must say that an editorial board alert to its responsibilities probably would have excluded it, if for no other reason on the basis of fairly broad and undocumented assertions.

But this again merely serves to call into question the basic lack of worth of the title "professor" in this context, and lest it become a term of opprobrium I will not pursue that thought further.

I will simply say that here again we have a recommended procedure—in fact, almost a mandated procedure, but for the incredibly swift action taken by the Congress in the matter—whose effect would have been to place the criminal litigant at a very, very substantial disadvantage similarly impacted.

And what are we talking about here?

In the very article upon which the transmitter of the rules relies—it's a 1971 article—I was very surprised to find how many infrequent petitions were. For the years 1968 through 1971, there was substantially less than one annual criminal removal petition, substantially less

than one, per Federal district. Not per county; per Federal district. Substantially less than one. And I have no hesitancy in urging to this body that the vast bulk of those were filed by the Government on behalf of Federal officers because the reach of this statute is so very, very limited as it applies to the private citizen.

I therefore ask again, what is it which is sought to be accomplished by this change? Is it possible there could someday be an abuse which a more restrictive rule would forestall? Yes; this is true. This is true with regard to absolutely any statute on the books. And I really cannot believe that the Congress will suffer itself to be persuaded that the potential for abuse should be grounds for modification of a procedure which has existed for years without any documented instance of abuse.

As to rule 41, the search warrant by telephone, I will simply take refuge in my academic status and from the ivory tower from which I am required to view such matters I will accept quite uncritically the proposition that what was intended here was not a further denigration of fourth amendment values, but rather a means of assuring that search warrants would indeed become more popular within the law enforcement fraternity.

In that regard, however, I am fearful that I must report to this body that the commendable objective of the formulators of the proposal to encourage the use of search warrants may unintentionally be subverted by the language that they have elected to apply.

To state that a telephonic application can be made and I think I have the language of the rule down, when circumstances make it reasonable to do so in the absence of a written affidavit, to state that is to generate the strong possibility that reasons may be found which have little if any relationship to any exigency in the normal sense of that term.

And the problem can, I suggest, be avoided by a relatively simple change in the phrasing of that rule.

The first clause need only read "When by reason of circumstances which could not reasonably have been anticipated, it is impractical to require a written affidavit * * *." Phrased that way, I believe that the rule would indeed be likely to become a vehicle for encouraging the use of the warrant and a restoration of certain fourth amendment values which have suffered quite fearfully over the past few years.

I cannot resist offering my views concerning certain colloquy which has occurred in my presence here today with respect to that provision.

A surveilling agent who decides that he wants to get a warrant for a footlocker, a steamer trunk, a building, anything one might imagine, really is not in the position of having to leave his surveillance in order to go off and apply for the warrant personally. All he need do is to make a telephone call from his office, and a fellow agent will go before the magistrate with a routine affidavit citing the proposition that upon reliable information received, the grounds for the search exist.

It is not necessary and has not been necessary for very, very many years, that the agent with firsthand knowledge of the grounds for search come forward as the affiant in support of the affidavit. Once the search warrant has in fact been issued, that fact can simply be relayed telephonically to the agent who had requested it. For that

reason, viewed as a serious problem, I am fearful that the necessity for a telephonic search warrant is a little bit difficult to discern. But viewed as a vehicle for the vindication of fourth amendment values, I concede, yes, it can have a meaningful quantum of usefulness provided only that it becomes very clear that this is not merely an alternative to normal search warrant procedure, to be resorted to at the convenience of the agent.

Now, I am sure you have heard a great deal about rule 6. And in its application to grand jury procedure my view is somewhat different, I fear, from that of other persons who have spoken on this subject at least this morning. I think that the proposed change to rule 6 has the cart very, very much in the wrong position as against the horse, because the grand jury is not there to assist the U.S. attorney. It is the other way around. The U.S. attorney is there to assist the grand jury.

As the proposal would have it, disclosures may be made to such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.

When we say that, we are opening up a very, very large can of worms indeed because the duties of the U.S. attorney extend far beyond anything with which the grand jury legitimately may be concerned. The duties of the U.S. attorney extend to a broad spectrum of civil matters, matters as to which the grand jury has no proper concern.

We have seen quite a great deal of case law over the last couple of years extolling the grand jury and offering justifications for the immense powers which it possesses. This package of rules is hardly the appropriate vehicle with which to address oneself to that concept. But the apologia for those powers is the proposition that the grand jury is a citizens' inquiry, not a supine instrumentality of the prosecutor.

This is the premise upon which we are proceeding.

Now, one must ask oneself what is the necessity for rule 6? Never in the history of this country has it been suggested, for example, that a prosecutor may not give dictation to his secretary relative to matters occurring before the grand jury. And *Dionisio*¹ and other cases make it very clear that the prosecutor is free to draw upon expertise from other agencies.

Again, a solution in search of a problem. But if this provision is to be adopted I suggest at page 11 of my written presentation linguistic modifications which would be appropriate and minimally necessary to assure that this rule is not converted into a method for broadcast dissemination of grand jury information across the entire spectrum of Federal agencies, and as well to assure that the grand jury itself does not become an instrumentality for such abuses.

Essentially, I suggest that after the words "attorneys for the government in the performance of their duties," we insert the words, "on behalf of the grand jury." "Duties on behalf of the grand jury."

And I urge that you further provide that the matter thus divulged shall not otherwise be disclosed.

I shall not, as I say, take this committee's time with my comments on rule 24. I endorse the views of those who find the proposal noxious.

¹ *United States v. Dionisio*, 410 U.S. 1 (1973).

But I will say only one thing in that general context. It has been commended to this body that restriction on the number of peremptory challenges will solve a meaningful time problem. I am in full accord with those who have told you that normal reasonable time for the selection of a Federal jury is an hour and a half, and it follows that to reduce the number of peremptory challenges by five would be most unlikely to speed the trial up by anything more than, oh, perhaps at the very outside, 20 minutes.

We must balance that against the disadvantage of a procedure which would actually call the factfinding result into serious question. If this body or any other body which may be involved in the formulation of rules is indeed concerned with the time that a Federal trial, I commend to the attention of any such person 18 United States Code, section 3500, which requires an adjournment of anywhere from 10 minutes to an hour following each prosecution witness while for the first time the prior statements of that witness are disclosed to defense counsel.

Defense counsel must then take the time to read it over and prepare for his cross-examination.

Section 3500 requires exactly that and if—and if in fact there is a concern with the length of time that a trial takes, I suggest that a very, very great deal more could be accomplished in that than ever could be imagined by reducing the number of peremptory challenges.

I am very grateful for the chance to have been heard.

Mr. MANN. Thank you very much.

Mr. Hall.

Mr. HALL. No questions, thank you very much.

Mr. MANN. Mr. Hyde.

Mr. HYDE. No, I think it was a very comprehensive presentation. Thank you, Mr. Lewis.

Mr. MANN. Mr. Gudger.

Mr. GUDGER. Dr. Lewis, I would like to ask if in connection with Jencks Act,¹ is it possible that should not be at the conclusion of the States examination of the applicable witness, but perhaps at some pre-trial time?

Prof. LEWIS. Yes, sir, beyond any question.

Mr. GUDGER. I had some feelings about that myself. Thank you very much.

Mr. MANN. Mr. Evans?

Mr. EVANS. Sir, we had as a previous witness, Judge Becker, who made a distinction in cases in the revelation of grand jury findings to an agency, criminal grand jury findings to an agency on the basis of good faith if he found that good faith existed, that the grand jury was not impaneled for the purpose of finding out something for that agency but for a legitimate question of a criminal matter, then he allowed the grand jury findings to be used for that agency in civil proceedings.

Do you in your opinion see any justification for the revelation of grand jury proceedings to be given to private civil agencies?

Prof. LEWIS. No, sir, I do not. Federal civil agencies have precisely the same discovery vehicles available to them as does any other liti-

¹ 18 U.S.C. § 3500.

gant, and beyond that, sir, substantially greater resources with which to pursue those recommendations.

I further believe that an inquiry as to whether a grand jury has addressed itself to a given subject matter in good faith is almost certainly doomed.

I cannot imagine that as a practical proposition there could be such an inquiry in meaningful terms. I can conceive of situations in which it might become patent that good faith was lacking. But I cannot imagine a situation in which one could say with any confidence that good faith had in fact been the motivation behind the convening of the grand jury in that context.

I further would note, sir, as you yourself have intimated, that there is a very, very serious problem here under section 6002, the immunity statute. Under the *Capetto* case out of the seventh circuit, it is possible now under 6002 for any, in any civil action to which the Government is a party—any civil action, doesn't have to be criminal at all—for the U.S. Attorney to file a simple petition which the court has no discretion to refuse. This is an aspect by the way of immunity procedures which is not frequently fully apprehended, but it's generally held that the court's function here is ministerial. The Government wants the information. That is alpha and omega.

Very well. If a witness from whom the Government wants information in a civil proceeding claims his fifth amendment privilege—or the remnant of it, frankly)—if he claims that the Government counsel need only submit his ritualized motion to the judge, who must grant it and that witness then must speak or go to jail.

Now, having that weapon available in civil cases certainly to my mind completely obviates the necessity for further employment of the grand jury in that regard.

I don't know really what was intended by the very broad immunity provision which was enacted as 6002. But I rather imagine that this body would be surprised to find as I was surprised to find that it is available in civil cases and that in fact if the Government sues an individual litigant for any purpose at all, any civil matter, and has no evidence to support it except what it may obtain from the defendant to that action himself, the defendant can be forced to testify over his fifth amendment claim under penalty of contempt and whatever he says under those circumstances can be used as the basis for obtaining a civil remedy against him.

This is shocking. But I assure you that it is the present law. As I say, under those circumstances I don't really believe that a Federal agency particularly needs grand jury procedures for any purpose other than criminal matters.

However, if the grand jury is employed, it then becomes possible to obtain discovery to which the adversary is not privy. In civil procedure, the adversary is advised of any information obtained through formal discovery quite routinely as a matter of course. If the grand jury is used, the litigant opposing the Government would not know what information had been elicited unless and until that information actually was used in the civil proceedings in court.

I hope that answers your question, sir.

Mr. EVANS. Oh, it does very explicitly. Let me ask you one other thing and it may not be exactly on point, but have we not by statute amended the Constitution?

Mr. LEWIS. Sir, the Constitution is a bunch of words. And I say that very reluctantly. I say it as a man who on several occasions has raised his right hand and sworn to preserve, protect, and defend the Constitution against all enemies, foreign and domestic, and then has gone forth with a total lack of moderation to attempt to do exactly that.

But as it now clear to me, the Constitution is words. And it means what its interpreters tell us that it means. When a court decision comes down the words on the Constitution don't change. But its thrust, its impact can be immensely modified.

Sir, I would like to believe that those who were responsible for the promulgation of the Constitution in its original form probably would not recognize, certainly would be offended by many of the things that are done under that document today.

Mr. EVANS. No further questions.

Prof. LEWIS. You asked me.

Mr. MANN. I understand your suggested language changes to 41(e). As you were describing about how, under the current practice, an officer can call in to an associate officer, who can then go before a magistrate and get a warrant, it suggested to me the possibility that the proposed rule could be changed so as to permit the associate officer to telephone the officer on the scene and tell him of the existence of the warrant and his authority to sign it. That is half the procedure proposed here.

Prof. LEWIS. Yes, sir.

Mr. MANN. How does that strike you? First, the associate has personally gone to the magistrate and made a statement. Then, because of distance or time involved, it's appropriate to expedite the delivery and service of the warrant. Why not expedite by telephone?

Prof. LEWIS. Well, Mr. Chairman, once the warrant has in fact been issued, the search may lawfully proceed in the absence of this warrant. Just indeed as can an arrest. Of course, the person impacted by the search is entitled to a copy of the warrant. But other than the receipt of anything seized he is not entitled to that on the spot. The copy of the warrant can be and often is given to him at a later time. I don't really believe that there would be any serious change accomplished by a provision that if a warrant has been issued, telephonic advice of the issuance of that warrant is cause for search. I think it is now.

Mr. MANN. I interpret your oral testimony to indicate that you don't think much of 41(c) as proposed.

Prof. LEWIS. I don't think much of its necessity, sir. But I believe again it could fulfill a very important function as a restatement by the Congress of the importance which it attaches to fourth amendment values. I would very much welcome that. But in terms of the necessity for 41(c) as a means of expediting the solutions to the problems of law enforcement, no, sir, I really don't see it.

Mr. SMETANKA. Professor Lewis, with regard to the suggested language on page 11 of your statement relating to rule 6(e), it has been suggested in previous days of hearings that language specifically could be included in the rule, placing the judge as sort of an arbiter of what is necessary for the U.S. attorney in the performance of his functions. Your language states no such thing. It states merely the duties would have to be performed on behalf of the grand jury. Would you have any objection to including the determination by the court possibly or—

Prof. LEWIS. No, sir, no objection to that whatever, as long as the standard by which the judge is to be guided is articulated within the rule. The standard which I propose, is that such disclosures must be in furtherance of duties performed on behalf of the grand jury, would I think be the single most important step to be taken in the preclusion of improper exploitation of the proposal that is before you, sir.

Mr. SMETANKA. Would you see any problem, for example, as to separation of powers or any other problem in requiring the U.S. attorney to perhaps apply to the judge?

Prof. LEWIS. No, sir, I don't see a problem there. In terms of separation of power I really don't. I believe that in fact perhaps a graver problem of separation of powers is generated where the United States attorney, as is now effectively the case, operates the grand jury, which is fundamentally a judicial body pretty much outside the regulatory power of the court. I think that that is a much more serious separation of powers problem than would be the investing of the judge with structured discretion relative to such disclosures.

But I emphasize again structured. And I think that it is imperative if a rule of this kind is to be enacted, that it be made clear that any disclosures which are made must be in furtherance of the grand jury's work and must be used for that purpose only.

Mr. SMETANKA. Thank you.

Prof. LEWIS. Thank you.

Mr. MANN. Thank you so much, Professor Lewis.

Prof. LEWIS. My very great honor, sir.

STATEMENT OF PROFESSOR MELVIN B. LEWIS, THE JOHN MARSHALL LAW SCHOOL

Mr. chairman and members of the committee: The pending Amendments to the Federal Rules of Criminal Procedure have been a matter of substantial concern to me for an extended period. Although I do not speak for either body, I am a member of the American Bar Association Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence, and I am also active in the Legislative Committee of the National Association of Criminal Defense Lawyers. I appear today in my private capacity, because I am concerned that the dramatic qualities of the proposed Amendments to Rules 6 (Disclosure of Grand Jury Information) and 24 (Reduction of Peremptory Challenges) may deflect the Committee's attention from serious problems presented by the other proposals for amendment. Although I have some views concerning Rules 6 and 24 which I will present if time permits, I believe that I can best contribute to this Committee's deliberations by focusing upon those proposals which have to this time received the smallest degree of attention.

AMENDMENT TO RULE 23: THE TIME OF THE REQUEST FOR FINDINGS

In respect to the substance of this Rule, I am in total accord with the presentations of both the American Bar Association and the National Association of Criminal Defense Lawyers. I believe, however, that the proposal is affected with qualities even more undesirable than those groups have suggested in their opposition. The Amendment is quite literally a solution in search of a problem.

As the Advisory Committee concedes, "findings of fact are essential to proper appellate review on a conviction resulting from a non-jury trial". A better word might be "indispensable". Any judgment is the product of a two-step operation: The facts are first determined; the appropriate principles of law are then applied to those facts. Normally, a jury is not requested to make express findings of fact, but the legal principles to be applied are expressly and precisely articulated through the settling and giving of jury instructions. In a non-jury trial, the legal principles applied by the court need not be expressed, but the underlying facts must be stated with precision. To insulate from scrutiny both the

factual findings and the legal principles, is to immunize the judgment against effective review except in the case of total evidentiary failure.

Federal Rule of Civil Procedure 52(a) renders findings of fact mandatory in non-jury cases, without the necessity of any express request. Not one instance of abuse of that provision on the part of any litigant has been cited by the Advisory Committee. Nor does the Committee cite any instance of abuse of this Rule by a criminal litigant. The Advisory Committee's comments give the impression that *U.S. v. Rivera*, 444 F. 2d 136 (2 Cir. 1971) is such a case, stating that in *Rivera* "the request was not made until the sentence had been imposed". That is a most misleading assertion. *Rivera* involved a two-day trial, with a finding of guilty and sentence imposed on the second day, *Rivera's* request for findings of fact was made on the next day—hardly an arguable imposition on the court. The reviewing court did not resolve the issue in terms of timeliness, but held that a request for findings is satisfied by a generalized statement if nothing more is requested. Such a request must, in the view of the *Rivera* court, be "focused on specific issues". 444 F. 2d at 138. Whatever *Rivera* may have established, it hardly justifies a suggestion that timeliness of a request for findings is a problem in criminal cases.

The internal citations from *Rivera* quoted by the Committee, are even less apposite to the problem. *Benchwick v. U.S.*, 297 F. 2d 330 (9 Cir. 1961) held nothing more than that a defendant is entitled to findings of fact only at the conclusion of the case, and not at the close of the government's case. In *U.S. v. Morris*, 263 F. 2d 594 (7 Cir. 1959) the request was made immediately upon entry of the general finding. No question whatever of timeliness was presented in *Morris* and the reviewing court found it "substantial error" to have refused his request.

The requirement of findings is not onerous. It was recently held, in a motion context under evidence Rule 609, that the requirement is fulfilled where the record shows that the trial judge analyzed the issue and based his conclusion on proper factors. *U.S. v. Cohen*, 544 F. 2d 781 (5 Cir. 1977).

The arbitrary actions which become possible where findings of fact are denied, are patent from *U.S. v. Dwyer*, 539 F. 2d 294 (2 Cir. 1976). In *Dwyer* the trial court entered an order whose presumptive impropriety was obvious, and flatly refused to recite the findings upon which that order was based. The reviewing court reversed, expressing substantial dissatisfaction with the trial court's adamant refusal to enter the requested findings, and pointing out that the existence of discretion does not imply immunity from accountability. A reading of *Dwyer* serves admirably to focus and illuminate the necessity for findings of fact, and the abuses of judicial discretion which become possible where such findings are unnecessary.

For no discernible reason, this body is asked to impose an arbitrary limitation of that right upon the most imperiled class of litigant in the federal system. Criminal defendants would have the right to findings of fact only at the expense of a pre-trial concession that they expect to be found guilty; for findings of fact can serve no purpose other than to assist a reviewing court on appeal from a judgment of guilty.

If there is any reason to limit the availability of such findings—and there is not—such limitation should obviously be imposed upon civil as well as criminal litigants. Any competent judge can state his findings orally in a criminal case within five minutes. To place an unconscionable price on the exercise of that right would be to deprive the bench trial of its only advantage. The inevitable result will be a diminution in the number of criminal litigants who are willing to accept bench trials, and a resulting sacrifice of both fundamental fairness and of economy.

AMENDMENT TO RULE 49.1: REMOVAL FROM STATE COURT

Again, the Committee is presented with a remedy which finds no corresponding ailment. An even graver problem, however, is presented by an aspect of this proposal which has not, so far as I am aware, been argued to the Congress.

Proposed Rule 40.1 flies directly in the face of a statute. Title 28, U.S. Code, § 1446(c) provides that a removal petition may be filed at any time prior to trial. The Judicial Conference finds within that statute a potential for misapplication. Clearly, the legislative process is the appropriate vehicle for the rectification of any statutory problems. I am immensely troubled—as I believe any thoughtful person must be—by resort to the rule-making power as a method of direct repeal of a statute. The two procedures are simply not alternative

methods of establishing law. The rule-making power is designed for the regulation of judicial procedure. Here, it has been used to construct an artificial and unrealistic statute of limitations in the face of a clearly contrary Congressional enactment.

The Congress last amended this statute in 1965. The revisor's note published in U.S. Code Annotated makes it clear that the Congressional decision to retain the provision permitting a removal petition "at any time before trial" was quite deliberate. In the revisor's words,

"This provision was retained to protect Federal officers enforcing revenue or criminal laws from being rushed to trial in State courts before petition for removal could be filed."

The proposal of the Judicial Conference would exacerbate this problem by permitting the state court to proceed up to the point of final conviction. In tandem with the proposed ten-day limitation, this would produce precisely the same possibility which the Congress sought to forestall. We believe that such a use of the rule-making power would fairly merit characterization as constitutionally inexcusable, even if the Judicial Conference were prepared to cite meaningful instances of abuse of the statute. In the absence of any showing that a problem exists, and taking into consideration the timing of the rule proposal and its transmission to Congress, the implications are extremely disquieting.

The Committee relies principally upon a 1971 law review article entitled "Abuse of Procedure in Removal of State Criminal Prosecutions". The title is indeed a grim one; but the only instance of proposed abuse cited within the article relates to a civil rather than to a criminal case. As an academician, I can assure you of two propositions: First, the so-called "Note" represents the lowest undergraduate contributory level of any law review. Second, any editorial board alert to its responsibilities would be likely to have rejected the article in question for its transparent bias and failure to document its assertions.

As that author concedes, during the years 1968 through 1970 an average of less than one annual criminal removal petition was filed in each federal district. It seems very probable that the bulk of these were filed by federal officials. Title 28, U.S. Code, § 1443 (2). It seems quite unrealistic to imagine, in the absence of any cited instance of abuse, that the problem is so acute as to justify the draconian action which the Judicial Conference has recommended.

Abuse is most unlikely. As the Judicial Conference notes, grounds for removal are now very limited. A district court is authorized to remand the case summarily if proper grounds for removal do not appear. 28 U.S.C. § 1447. The right of appeal is limited (28 U.S.C. § 1447 (d)) and any stay of the remand order is a matter of discretion rather than of right. *State of Maryland v. Brown*, 311 F. Supp. 1164 (D Md. 1970), *aff'd* 426 F. 2d 800; *Poore v. Ohio*, 243 F. Supp. 777 (D Ohio 1965). The infrequency of removal petitions stems from an awareness that such a petition is probably doomed by current legal doctrine except when filed on behalf of a federal officer; and an unsuccessful attempt to remove the case will almost certainly provoke meaningful retaliation in the state court. There is no reason to hamstring those few litigants who have a bona fide belief that their petitions are just.

"Hamstring" is precisely the word. In many districts, a substantial amount of travel is required to reach the federal court. If the state court is to be free to preoccupy the litigant with motions, discovery and trial during the pendency of such a petition, the right to present such a petition can be completely subverted.

AMENDMENT TO RULE 41: SEARCH WARRANT BY TELEPHONE

The Judicial Conference states that this proposal is designed to encourage the interposition of the judgment of the detached magistrate in cases which might otherwise lead to an unwarranted search.

For present purposes, I accept that view and proceed on the assumption that this Committee has been truthfully advised that no further denigration of Fourth Amendment values is intended by the proposal.

On that assumption, the Judicial Conference certainly did not intend to permit the telephone procedure to be used as a mere alternative to the written application. Telephonic search warrant procedure is indeed, as the Committee suggests, more reliable than the unsupervised judgment of the policeman; but it is obviously less reliable than formal written application. Indeed, the magistrate may not even know his caller. Similarly, recording instruments have frequently been

known to produce incomprehensible tapes, and sometimes to fail altogether. And it is to be doubted that many magistrates possess the secretarial skills implicit in the Judicial Conference's hopeful example of alternative procedures.

I am fearful, however, that the language employed by the Judicial Conference may subvert the praiseworthy objective which it has articulated. To state that telephonic application can be made "when the circumstances make it reasonable to do so in the absence of a written affidavit", is to generate the strong probability that "reasons" may be found which are totally unrelated to any unanticipated exigency.

This problem can be avoided by a simple change in the first sentence of proposed Rule 41(c) (2). The first clause need only read, "When, by reason of circumstances which could not reasonably have been anticipated, it is impractical to require a written affidavit . . ." That change will make it clear that the procedure is intended to support, rather than to denigrate the constitutional requirement for a warrant as a condition of a search. I would further urge that the language of the second sentence providing that the testimony "shall be recorded and transcribed", should be changed to read, "shall, if possible, be recorded electronically and transcribed; otherwise, the statement shall be recorded verbatim by the magistrate. All transcriptions, recordings, and written statements shall be certified with the magistrate and filed with the court". The tape recording itself would serve a very real purpose in such circumstances, and should be preserved for such future proceedings as might be appropriate.

AMENDMENT TO RULE 6: GRAND JURY PROCEDURE

In its consideration of grand jury procedure, unlike its other proposals, the Judicial Conference addresses itself to an instrumentality possessing the demonstrated capacity for serious abuse. However, the proposal would tend to exacerbate rather than to restrain the abuses.

Many extravagant presumptions have been indulged in favor of grand jury demands upon citizens. The propriety of those procedures generally are currently under debate in connection with other proposed legislation; and these Rules are not an appropriate vehicle for an extensive discussion of that issue.

However, the present proposal is the product of a serious misconception. The tolerance extended to present grand jury procedures are bottomed on the premise that its actions are those of a citizens' group, not those of a prosecutor. In short, it is the function of the prosecutor to aid the grand jury, rather than the converse as implied by the proposed Amendment to Rule 6. The duties of the prosecutor extend far beyond anything with which a grand jury properly may be concerned; and service to the grand jury is only one of the prosecutor's duties. Accordingly, authorization for disclosure of grand jury materials to "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties" would open up grand jury material to a broad spectrum of personnel indeed, from the IRS to the OEO.

Nobody has ever suggested that a government attorney may not give dictation to his secretary with respect to matters occurring before the grand jury. Both the thrust and the reach of the proposed rule immensely broaden the availability of the grand jury as a subservient arm of innumerable government agencies who are properly concerned only with civil proceedings. Heretofore, that type of misuse of the grand jury has been impeded by the holdings in such cases as *In re Holovachka*, 317 F. 2d 834 (7th Cir. 1963); *In re April 1956 Term Grand Jury*, 239 F. 2d 263 (7th Cir. 1965); and *In re Kadish*, 377 F. Supp. 951 (N.D. Ill. 1974). The present Rule has largely kept grand juries doing business within their proper area of concern: Determining whether probable cause for criminal prosecution exists rather than doing the bidding of the prosecutors' offices in unrelated matters. Without some additional limitation, therefore, upon the purpose for which disclosure may be made to persons other than attorneys for the government and the purpose for which those persons may utilize information so gleaned, I strongly oppose the approval of the Amendment to Rule 6.

For its articulated purpose, the proposed Amendment to Rule 6 is completely unnecessary. However, if some action be deemed required to satisfy the articulated objectives of the Judicial Conference, we suggest that this can be done readily without creating codified encouragement for broadest dissemination of grand jury materials. It is necessary only to add a simple phrase to the proposed new second sentence of Rule 6(e). That sentence would then read as follows (this writer's proposed modification is emphasized) :

For purposes of this subdivision, "attorneys for the government" includes those enumerated in rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties on behalf of the grand jury; but no such person shall otherwise disclose or use any such information.

AMENDMENT TO RULE 24: REDUCTION IN PEREMPTORY CHALLENGES

I am in total accord with the positions adopted by the American Bar Association and the National Association of Criminal Defense Lawyers. To their cogent and reasoned arguments, I would add only one thought.

Where veniremen profess an ability to be fair notwithstanding their adverse preconceptions, a defendant, unlike a judge, cannot go behind those assertions. If he does not believe that the jurors will be fair, he is not entitled to waive a jury and to be tried by the judge alone. *U.S. v. Morlang*, 531 F.2d 183, 187 (4 Cir. 1975). The peremptory challenge is his only remedy. That remedy should not be impaired in the absence of a much more compelling showing than has been suggested in support of the present proposal.

Mr. MANN. Our final witness is Robert Bailey, chairman of the Legislative Committee of the National Association of Criminal Defense Lawyers.

Mr. BAILEY. Good afternoon.

Mr. MANN. Mr. Bailey has appeared before us before and we are pleased to have him before us again.

Your written statement will, without objection, be made a part of the record.

You may proceed as you choose.

TESTIMONY OF ROBERT S. BAILEY, CHAIRMAN, LEGISLATIVE COMMITTEE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. BAILEY. Referring to the discussion here this morning about the voice, so to speak, from the pits, I think that probably the National Association of Criminal Defense Lawyers is entitled to that distinction, if no other, perhaps as much as anyone.

I hope our written submission and what we have to say will be considered by the subcommittee as—literally—the voice from the pits. It is our membership who are the fellows who are in the courtrooms every day in every part of this country. We are the people who are going to have to live with the cutting edge of any of these proposed changes in the rules.

Now, the most important rule change proposed, the most important issue before this subcommittee, by far, in our opinion, is the proposed amendment to rule 24, which would decrease the number of peremptory challenges available and which, further, would have the effect not only of decreasing defense peremptories but of equalizing defense peremptories and prosecution peremptories.

Now, this has, this is terribly important. This has a real cutting edge when one considers the trial strategy of utilizing your peremptories in order, lest we forget, in order to get a fair, impartial jury to consider one's client's case. That is all we want.

Now, by using your peremptories and going through all the voir dire, one does not ever get to say who is going to sit on the jury. What one really gets is a veto. In other words, we can say who is not going to

sit on the jury. If you start out with, as we have now, 10 challenges, you can't challenge a whole 12. You have only 10 challenges.

Now this concept becomes terribly important when we get down to the last few jurors. And you must consider utilization of your peremptories in conjunction with how many he's got left and who is sitting in the back of the room. What equalization of peremptories between the prosecutor and defense lawyer does is permit the prosecutor to pick the jury.

There will be on every panel of 12, believe me, some people I have to get rid of—some people whom, if I did not get rid of, I should probably take my law license and turn it in.

Anybody's who's ever defended a criminal case in any court in the world knows that. But that is not true of the prosecutor, that was not true of me in the days when I was a prosecutor.

What you do when you equalize is effectively unequalize. What you do when you equalize the number of peremptories is give the prosecutor a totally unwarranted tactical advantage in the selection of a jury.

In our experience anytime you give a prosecutor a totally unwarranted tactical advantage in a criminal courtroom, he assuredly is going to use it. What this means in the selection of a fair and impartial jury is just overlooked in a proposal that stems from—I don't know what is stems from. Certainly there is no demonstrable need for the sort of thing.

We have heard witness after witness this morning testify that the average time spent in jury selection is about 1½ to 2 hours. That certainly is true. That is certainly in accordance with the experience of our membership. It never takes longer than one courtroom session, morning or afternoon. You know a morning courtroom session is always supposed to start at 10 o'clock, but there is a motion call and you almost never get underway until 11 with the jury selection and the jury is picked by 12:30. When everybody goes out to lunch. There is almost no need for these changes. They do not serve justice.

Our association is very, very much opposed to it.

There is one situation, I might add, in which jury selection sometimes takes longer than that 1½- or 2-hour court session. That situation occurs when we don't have—by false economy—we don't have enough veniremen in the courtroom to allow the selection of the full jury before running out of them. In that situation, we have to get the marshal on the telephone and get some more people down there and, more than that, we waste additional time because we have to start all over again.

This rule, like that situation, is just another example of false economy. It won't economize on time. It says nothing to the really very practical problems that most of the witnesses I have heard here this morning have talked to, that is, the content of the voir dire and who conducts it. Those are problems. This says nothing to that. All this rule does is cut down on peremptory challenges.

Now, it takes me in a courtroom about 30 seconds, perhaps, to exercise a peremptory challenge. If you are cutting me down by six, you might be saving 3 minutes. I don't know that you are going to be saving 3 minutes because the 5 I am left with I am going to think about more carefully perhaps than I would have and maybe, instead of 30 seconds, it will take me a minute and a half to decide how to use those.

I think you are creating trial imbalance and tactical advantage to the prosecutor, you are not saving any time if that is what you want. You are not really saving any money either.

You have a rule that has been promulgated in response to no demonstrable need.

I think the Congress should turn that rule down. I can't impress upon you enough the depth of feeling in the organization that I represent against this rule.

Lawyers, particularly trial lawyers, particularly criminal trial lawyers, are a notoriously quarrelsome lot. The recommendation to the Congress of the United States to disapprove the amendments to rule 24 is just about the only proposition one could conceive of upon which the membership of the National Association of Criminal Defense Lawyers would be unanimous.

We have trouble enough picking our jurors and getting fair ones now. We have trouble enough. These potential jurors come in, and see you and your client and you know what he looks like usually. And on the other side here is their Government. They start with the predisposition; that this fellow is probably here because he did something or other. That is natural and normal. We cannot change that. No rule can change that. That natural reaction stems from years and years in which the Government and prosecutors and Federal agents, by and large, did the right things and persuaded the people of the country to trust them. They got a reputation justly for being rather good at their jobs. The country ought to be proud of that.

But all that has a cutting edge in the courtroom. And there are those cases—there are those cases of defendants who are tried in Federal courtrooms who are, gentlemen, not guilty. There is the defendant that we have maybe next week or next month who didn't do it.

I cannot overemphasize to you my view of the importance of the Congress turning down, disapproving rule 24.

Our written statement covers some of the other rules.

I don't really have much to add to that orally. It is said about the proposed rule 23 change requiring request for findings that we need this to prevent the horrible circumstance Professor Lewis mentioned, the *Rivera* case,¹ where the request came hours after sentence, I would say to you, gentlemen, why not after sentence? What is wrong with after sentence? After all, you don't need findings unless you are going to appeal. You don't know whether you are going to appeal until after sentence.

You will find frequently in a Federal bench trial, a defendant found guilty by a judge will come out of that courtroom and he will be saying, "I want to go to the Supreme Court; I want to go all the way up, the highest court in the land; and if the Supreme Court won't hear me, I am going to go to God, because that's wrong. I didn't do it." But then a few weeks later comes the day of sentencing and he's really a pretty nice fellow and he works hard every day and he's never been convicted of a crime before and he has a wife and three kids and the judge gives him probation. He's still going up.

Then you sit down and talk to him and tell him how much the court reporter wants for the transcript. And you tell him how much you want to write the brief. And you tell him the costs of getting the rec-

¹ *United States v. Rivera*, 444 F.2d 130 (2d Cir. 1971).

ord together, the docket fees and all the rest and put it together and he's got probation and he says, "I don't want to appeal."

Now, what is the sense of having findings of fact and conclusions of law in a case like that? Nobody's ever going to use them.

We suggest that is a waste of judicial time, or more likely, lawyer's time, because you know what the judge is going to do when he's going to have to prepare findings of fact. He's going to look at the prosecutor and say, Mr. So-and-So, have those findings of fact in my chambers this afternoon, I will sign them. But it is time anyway and it is valuable. Why spend time preparing findings in cases in which those findings are never going to serve any useful purpose to anyone?

Why not provide that findings get filed on or before the due date for the designation of the record? That is when you need them. The findings should be available to the clerk of the district court when he starts making up the record. Nobody needs them before then.

Under the proposed change you will find many cases in which, to protect your client's rights, you would have to ask for them, but it ends up that nobody needs them at all. Why waste time with that?

About removal provision, I have only to say fundamentally that the 10-day time limitation won't work. I don't even know that the 10-day time limitation in the removal rule can be imposed effectively. I don't know whether this rule does what it is supposed to do because of the availability of habeas corpus. The *Neagle*¹ case from the Supreme Court almost a century ago held that habeas was an appropriate vehicle to gain release from State custody of a Federal officer who was charged with a crime which occurred in performance of his duties. Can this rule run around habeas? I don't know.

I don't propose to give you an answer to that, but I do propose to ask why are we trying. What, in the name of all that is holy, is so important about putting someone with a removal proposition, a Federal officer accused of a State crime, in the position of having to decide within 10 days whether he wants to be tried in Federal court or the State court? What is so important about it? Is there some magic to it? Why not 20 days? Why not anytime before trial? What difference does it make? This is a response to a nonexistent problem. In 20 years of the practice of law, I have seen one removal case. I think the experience of most practicing lawyers would be comparable to mine. That one case in 20 years.

Again, a response to a problem that doesn't exist.

Finally, the search warrant rule 41, in addition to the part about the telephone, I think that the first paragraph is objectionable, too, for a really serious reason, having to do with your point, Mr. Evans, about amending the Constitution of the United States by statute or even more significantly, possibly by rule.

There is a phrase in there which says that the probable cause for the issuance of the search warrant may be predicated entirely upon hearsay. That is an excellent statement of half of the law. And that's the trouble with it.

We have no quarrel with that proposition. We think the law and we have cited the cases in our submission, goes on to require that a magistrate be given some reason, some identifiable expressible, stated reason to credit the hearsay. This is intended to separate our hearsay

¹ *In re Neagle*, 135 U.S. 1 (1889).

upon which one can reliably act, from rumor. An agent comes in before a magistrate. He says: "My informer told me Bob Bailey has heroin in his bedroom." Who is the informer? Where does he live? Has he been in the bedroom? Has he seen the heroin? Has he tasted it? Would he know it if he saw it? Has he given reliable testimony in the past? All these are constitutionally permissible methods of buttressing that hearsay, which is given to the magistrate to the point where the magistrate can safely rely upon it, issue a warrant, and permit agents to come into my bedroom.

What I have just tried to do is to state the whole law.

I find a significant difference between the statement of the whole law and the statement of half of the law which is in this rule to be important.

I do not think we should demean the fourth amendment and important conditions of living as free men that that amendment is intended to protect any further than they have been in the past few years.

First of all, if there is any justification for telephonic search warrants, it is only in the unusual case. And this rule permits the tail to wag the dog. You are going to have telephonic search warrant without any reason. In Chicago the magistrates sit on the 24th floor, the FBI office is on the 10th floor, and, count on it, you will have agents who will pick up the telephone and call from the 10th floor to the 24th floor because it is easier than getting up and going up the elevator.

I think certainly that language ought to be changed to prevent just that. I mean if he's there, why can't he go up to the 24th floor? Then at least we will know who the man on the other end of this information is, because he's standing in front of us. Then at least a magistrate can, if he wants to, and this is a judicial function, look him in the eye and say to him, "Now, you are telling the truth now, aren't you?" And see what that man's reaction is. That is a time-tested way of ascertaining truth in law, demeanor.

When you put a telephone between you and me, you are going to lose. We both are going to lose a lot of the communicative expression that hopefully is going on between us.

I will take the problem one more step. How do you ever assess responsibility in a telephonic situation? How can you ever be sure who was on the other end of the phone?

Suppose something goes wrong. Things go wrong sometimes in the execution of search warrants. Suppose something goes wrong and then an agent whose name was given to the magistrate says, "No, I didn't make the call." What do you have to go on?

The only conceivable way you could ever affix responsibility in that kind of situation would be if the magistrate were so familiar with every Federal agent that he could stand in a courtroom and raise his right hand and say, "I recognized his voice."

In a metropolitan district that is impossible. There are too many Federal agents. Even in a rural district, it is exceedingly unlikely because those districts are bigger.

I want to leave you with just one thought that occurred to me earlier, as I was sitting here listening to the previous witnesses testify.

I did mention before that at one time I was a prosecutor and I was a Federal prosecutor, I worked right up the street at the Department

of Justice, and I can recall on occasion which has stayed with me for a long time. I was declaiming against the system by virtue of just having had my teeth kicked in by a better lawyer and moaning about how difficult it was to put guilty people in prison when a very wise man told me to quit, in no uncertain terms. What he said then was, "Sure, your job is hard. A prosecutor's job is tough, it is hard. But remember—remember, the first day that the prosecutor's job is easy is the day when you wouldn't want to live in the country."

What we have in these rules is a collection of methods, by which, I suppose, it is hoped by somebody to make the prosecutor's job easy.

I think the heart of our objection to these rules is that the prosecutor's job should never be easy.

Mr. Chairman, that is what I have to say.

Mr. MANN. Thank you very much.

Are there any questions?

Mr. HALL. No questions.

Mr. HYDE. No questions.

Mr. MANN. Well, we certainly appreciate your testimony. Thank you so much.

STATEMENT OF ROBERT S. BAILEY, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

1. GENERAL COMMENTS

Generally, the National Association of Criminal Defense Lawyers opposes the rule changes promulgated by the Supreme Court on April 26, 1976, and urges the Subcommittee to recommend that they be specifically disapproved by the Congress.

By far, the most significant change the proposed rules would accomplish lies in a reduction of the number of peremptory challenges available to a defendant in a federal felony case accomplished by the proposed Rule 24. Rule 24 provides that in such cases, each side shall henceforth have five peremptory challenges, whereas the present rules provide that a defendant shall have ten and the government but six. For the reasons set out herein, we believe that the present rule should be retained.

Other matters of significance covered in the proposed rule changes are also worthy of attention. The amendments to Rule 6 would, we fear, erode the secrecy of grand jury proceedings to the detriment of persons required to testify. The amendment to Rule 23 requiring a specific request for findings of fact and conclusions of law in a bench trial prior to the court's entry of a general finding results in an imbalance between litigants in criminal and civil cases and presents to a criminal defendant and his attorney a peculiar, unique, and unnecessary dilemma. Rule 40.1 on the general subject of the removal of criminal cases from State to federal courts contains what promises to be totally unworkable ten-day limitation which we recommend that the Subcommittee delete. The proposed amendments to Rule 41 further derogate the provisions of the Fourth Amendment to the Constitution of the United States concerning searches and seizures. The provision of proposed Rule 41(c)(1) explicitly authorizing hearsay is objectionable because it does not equally provide that an affidavit supporting a search warrant must contain reasons leading a judicial officer to credit the hearsay. The provision of proposed Rule 41(c)(2) permitting search warrants to issue upon telephone calls does not require exigent circumstances as a predicate to the invocation of the proposed rule. It also further dilutes a judicial officer's ability to determine the credibility of the information offered to him to establish probable cause. We, therefore, urge the Congress not to permit the rules as promulgated by the Supreme Court to become operative.

2. THE PROPOSED AMENDMENT TO RULE 24

The proposal contemplates a reduction of fifty percent in the number of peremptory challenges available to the defense in the usual case, the elimination

of the numerical advantage heretofore granted the defense in non-capital felony cases, and a substantial change in the procedure for impanelling alternate jurors.

We urge that no proper purpose will be served by a reduction in the number of peremptory challenges. We believe that recent developments indicate the necessity for an increase rather than reduction. We further submit that retention of the numerical advantage traditionally granted the defense in peremptory challenges is necessary to avoid a serious imbalance which otherwise would result from advantages enjoyed by the prosecution in this area. Finally, we would draw the Committee's attention to serious problems which may result from adoption of the proposal for change in the handling of alternate jurors.

As the Advisory Committee states, a proposal for reduction in the number of peremptory challenges was advanced in 1962. Communication from the Chief Justice, p. 14. Not contained within that communication is the earlier acknowledgement of the Committee that the proposal was abandoned at that time because of overwhelming negative comments from bench and bar.

The only intervening consideration cited to the Congress is the 1968 Jury Act, which declares the policy that litigants should have the right to juries "selected at random from a fair cross-section of the community. . . ." It seems most anomalous that this Congressional mandate, confirming the right to an impartial jury, should be viewed by the Advisory Committee as supporting the impairment of the most significant safeguard of that right.

That is not an adverse criticism of the Advisory Committee. It did not originate the proposal. Instead, the proposal was transmitted to it by its parent body "for its favorable consideration." Communication from the Chief Justice, p. 14. Against that background, the necessity for cautious deliberation in the Congress is intensified.

The developments since 1962 provide no indication of need or of desirability for diminution of the right to peremptory challenge. Indeed, we are unaware of any support for the proposal from any organized bar group. The American Bar Association's representative adequately stated to this body: "The proposed amendment to Rule 24(b) was forcefully opposed at every level of ABA consideration, with few expressions of support of this change."

It is established law that a preformed opinion on the part of a venireman does not constitute grounds for challenge, provided that the juror states that he can lay aside his opinion and decide the case on the evidence. This rule is predicated upon the belief that voir dire examination should encompass such an inquiry as will reveal the venireman's true state of mind. *Irvin v. Dowd*, 366 U.S. 717 (1961); *Beck v. Washington*, 369 U.S. 541 (1962). In the light of the developments since 1962, however, that notion barely rises to the dignity of a legal fiction.

Since 1962, the nature of inquiries to jurors has become essentially superficial and conclusory. The scope of the required examination into juror qualification and thus of the challenge for cause has narrowed. *Ham v. South Carolina*, 409 U.S. 524 (1973). Few district judges permit any questions whatever to be addressed to the venireman by counsel in the case. Rare indeed is the prospective juror who will confess that he is incapable of being fair, regardless of the strength of his preformed opinions. The prevailing standard seems to be in practice that which the Fourth Circuit expressly articulated. A jury is presumed fair if "it is not inconceivable . . . that they would be unaffected by their (pretrial exposures)." *United States v. Morlang*, 531 F.2d 183 (4th Cir., 1975).

The assurance of a juror that he can be impartial, regardless of his preconceived notions is one which the courts "will not readily discount." *Murphy v. Florida*, 95 S. Ct. 2031, 2036 (1975).

It must also be remembered that a venireman is not cross-examined. Once he has articulated the "magic words" of impartiality—with whatever degree of obvious reluctance, and against whatever background of "discardable" preconception—there can be no challenge for cause.

Under interrogation by a judge, a venireman is almost certain to give the conclusory answer which he believes to be the acceptable one. That tendency, known to every practicing lawyer, is illustrated by the reaction of the jurors described in *People v. Duncan* (1960), 3 Cal. Rptr. 351, 356, 350 P. 2d 103, 108. Questioned by counsel, those jurors stated that they had formed an opinion of guilt from newspaper publicity, and that it would require evidence to overcome that opinion. Questioned further by the judge, they said they would act impartially and solely on the basis of the evidence notwithstanding their opinions. The defendant was sentenced to death. On review, the *Duncan* court stated that the jurors' "conflict-

ing statements" presented only a factual question for the trial judge, and that State and Federal precedent supported the seating of such jurors.

A juror will almost never adhere to a position which mandates disqualification in the face of questioning from the bench which indicates that the juror's position is legally unacceptable. For that reason, the challenge for cause is not a reliable method for exclusion of biased jurors.

The dominant influence of judicial interrogation is not the only factor which tends to inhibit a candid exposition of grounds for disqualification. Regardless of the method of interrogation, veniremen tend to mask their true feelings to a degree proportionate to their desire to participate in the case. Harrington and Dempsey, "Psychological Factors in Jury Selection" (1969), 37 Tenn. L. Rev. 173, 177-178; Erlanger, "Jury Research in America," 4 Law and Society Review (Feb. 1970), 345, 348. Moreover, a venireman is unlikely to admit bias publicly because he is unwilling to recognize himself as prejudiced. Blinder, "Psychiatry in the Everyday Practice of Law" (Lawyers Co-Operative Publ. Co., 1973), 117-118.

For all these reasons and many others, in attempting to identify hostility and bias during jury selection counsel must rely upon such imponderables as hesitancy, equivocation, disparity in reactions to antithetical questions and comparable indications. Such matters can be reached only by the peremptory challenge.

It must also be remembered that a federal criminal defendant does not have the right to a bench trial. *Singer v. United States*, 380 U.S. 24; *United States v. Jackson*, 390 U.S. 570. Thus, a defendant whose apprehensions concerning the impartiality of the venire are so strong that he is willing to forego his right of trial by jury, has no recourse unless he can show pandemic prejudice so strong that they "will close the mind against the testimony that many be offered in opposition to them . . ." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), (quoting with approval from 1 Burr's Trial, 416 (1807)). Thus, the standard for entitlement to a bench trial is prejudice so pandemic as to preclude the possibility of the impaneling of a fair jury. This body of law, derived from an era of relaxed and extensive voir dire examination by counsel, is applied quite uncritically to the present age of attenuated and conclusory questioning. *United States v. Morlang*, 531 F.2d 183, 187 (7th Cir., 1975).

The Advisory Committee would reduce the number of peremptories on two grounds: to prevent misuse of the peremptory challenge as a means of systematic elimination of members of a given group," and to "accelerate voir dire procedures and facilitate savings in juror costs. . ." Communication from the Chief Justice, P. 14.

We respectfully suggest that neither of these assigned reasons would justify the action which the Congress is asked to take.

No knowledgeable person would seriously suggest that the defense has been the source of disqualification of minority group members in criminal cases. Broadly, and discounting only the special case of the accused whose defense suggested hostility to members of minority groups, the defense is all too happy to welcome such persons to jury panels.

It is wonderfully poignant that the very day on which this Committee's hearing commenced, saw the publication of a Second Circuit opinion granting to the government a writ of mandamus to expunge a district court order designed to curb the exercise of the government's peremptory challenges on a discriminatory basis. *United States v. Newman*, 20 Cr. L. 2433. The lower court order had been entered on the basis of statistical data which showed that over a two-year period, the government had challenged 70 percent of all black veniremen, and had challenged 85 percent of black veniremen in cases involving minority defendants. 20 Cr. L. at 2085. The Second Circuit reversed in an opinion which considered only the over-all black disqualification rate of 67 percent, drawing no separate statistic as to cases involving minority group defendants. The Second Circuit noted that Blacks constitute five percent of the Connecticut population, that they provide 2.11 percent of all jurors; and that these figures show "a disparity of 2.89 percent," far below the ten percent figure which the Supreme Court found inadequate as proof of prejudice in a 1965 Alabama case, 20 Cr. L. at 2434.

Accepting the Second Circuit's view of statistical methods, it is difficult to imagine a ten percent exclusion rate of a group which comprises only five percent of the population. Each member of the group would have to be disqualified twice in order to meet that heroic standard. However, earlier cases clearly reflect a government practice of the use of peremptory challenges to exclude minority groups over the vigorous objections of the defense. *United States v.*

Pearson, 448 F. 2d 1207 (5th Cir., 1971); *United States v. Carlton*, 456 F. 2d 207 (5th Cir., 1972); *United States v. Pollard*, 483 F. 2d 929 (8th Cir., 1973); *United States v. Carter*, 528 F. 2d 844 (8th Cir., 1975); *United States v. Nelson*, 529 F. 2d 40 (8th Cir., 1976).

In the very teeth of this record, the Judicial Conference proposes to assure minority jury participation by decreasing the number of defense peremptory challenges. Surely, the ear of reason is jarred by that suggestion.

Judicial Administration and economy are legitimate considerations, but they should not be permitted to become paramount. The significant objective is a reliable fact-finding process. Any economy achieved at the expense of that is fundamentally undesirable. And any savings would be minimal indeed.

A recent poll conducted by the Illinois Association of Defense Lawyers indicates that the average time consumed by jury selection in that district is approximately two hours. The proposal has been the subject of extensive discussion at the director's meetings and annual conventions of the National Association since it was first promulgated. It is the consensus of that group, whose professional activities have encompassed virtually every federal district, that jury selection is almost always completed in a single morning or afternoon court session. The expenditure of time in jury selection simply is not a meaningful problem in present federal criminal practice. Considering the voir dire procedures currently employed by most federal judges, it is difficult to accept the likelihood that the exercise of any one peremptory challenge can delay the trial by as much as five minutes. That seems a modest price for an assurance of impartiality.

In terms of expense, the proposal would accomplish a theoretical reduction of six jurors in the venire required for a federal felony trial. We suggest that this saving is as ephemeral as it is modest. Venires have characteristically consisted in a substantially greater number than the aggregate of the jury with its alternates plus all available peremptory challenges. Allowance must be made for the infrequent challenge for cause, and for veniremen with justified reasons for requesting to be excused from service. The ultimate economy is achieved by calling a venire sufficiently large to prevent any possible delay occasioned by the necessity for finding and indoctrinating additional jurors in the middle of voir dire. A venireman excused from one trial is available for duty in another trial, frequently contemporaneous. Given the necessity for concurrent service by the venire in civil trials, it is to be doubted that the proposed reduction in peremptory challenges will accomplish economy of dimensions comparable to its impact on the validity of the trial process.

We would further note that a decrease in the number of peremptory challenges would be likely to cause an increase in the number of appeals and reversals based upon claims of pre-trial publicity, community prejudice, and error in overruling challenges for cause. Under the present allocation, such claims are frequently avoided by noting the availability of a sufficient number of peremptory challenges to obviate the problem, particularly where the peremptory challenges are not exhausted. See, e.g., *Hopt v. Utah*, 120 U.S. 430, 436 (1886); *Needham v. United States*, 73 F. 2d 1, 3 (7th Cir., 1934); *Graham v. United States*, 257 F. 2d 724, 729 (6th Cir. 1958); *Jordan v. United States*, 295 F. 2d 355, 356 (10th Cir., 1961); *Leonard v. United States*, 324 F.2d 914, 195, (9th Cir., 1963).

Thus, it is at least as likely that a reduction in the number of peremptory challenges would produce substantial delays and expenditures as that it would produce economy and efficiency. But the ultimate price—impairment of the right to impartial jury—is beyond measure.

Not only would the proposed Rule change decrease defense peremptories from ten to five, but in addition it would provide an equal number of peremptories to the prosecutor. The proposed revision reflects a report by the Committee on the Operation of the Jury System which states that "Little justification for . . . disparity is apparent." We hope that we may be of service to the Committee by pointing out such justification. The present rule, in awarding a larger number of peremptory challenges to the defense than to the prosecution, reflects a recognition of basic facts which require that result in the interests of simple justice.

We have already touched upon one basis for the numerical asymmetry. The worth of a peremptory challenge depends upon the challenger's knowledge of the juror's background. In almost all cases, the prosecutor enjoys a vastly superior position in this regard. He frequently can compile information at the public expense, and enjoys the services of skilled government investigators. He can draw upon sources which are foreclosed to any official inquiry. On the other hand, the defendant has access only to such information as he can gather at his own

expense, for it has been held uniformly that the prosecutor need not share his information with the defense.

Thus, the prosecution has selected juries relying upon exclusive access to the income tax returns of the veniremen, *United States v. Costello*, 255 F. 2d 876 (2d Cir., 1958); FBI background investigators of all veniremen *Best v. United States*, 184 F. 2d 131 (1st Cir., 1950); government agency record checks and investigative reports on veniremen, *Martin v. United States*, 266 F.2d 97 (5th Cir., 1959); a "book" reflecting the previous verdicts of every venireman, including jury room performance in some cases. *Hamer v. United States*, 259 F. 2d 274 (9th Cir., 1958); unspecified and undisclosed notes concerning the veniremen, *Christoffel v. United States*, 171 F. 2d 1004 (D.C. Cir., 1948), reversed on other grounds, 388 U.S. 85; report of interview with a venireman, *People v. Ruef*, 114 P. 54 (Cal., 1910); and police reports of investigations of veniremen, *Comm. v. McCann*, 91 N.E. 2d 214 (Mass., 1950). The defense is denied access to any such information. *People ex rel Keller v. Superior Court*, 1 Cal. Rptr. 55, 78 A.L.R. 2d 305 (1959). Indeed, the only defense vehicle with which to gain access to jury lists appears to be 28 U.S.C. 1867(1), but information gained under that section may be used only to maintain and support a challenge to the array based on systematic exclusion. See *Test v. United States*, 420 U.S. 28.

Jury selection based on limited information presents a problem of such magnitude, even with the present allocation of peremptories, as to have given rise to a new branch of social science: jury analysis. Time Magazine (1/28/74, p. 60) recently published an article concerning one such team of specialists. They employ large numbers of assistants to compile demographic studies and background investigations of potential jurors. The results are then analyzed by computer to determine desirable juror profiles. The final phase of the service consists in observation of the veniremen during voir dire. Time quotes the sociologist-investigator as saying that he merely does "what lawyers do—only more systematically." Such services can compensate for a reduction in peremptory challenges, but only to the benefit of the rare litigant to whom they are available.

Any reduction in the number of peremptory challenges can only tend to intensify the possibility that financial resources can be determinative of a criminal defendant's chances for an acquittal. It will also necessarily diminish the likelihood that the jury will be truly impartial.

The only appropriate balancing factor is to permit the defense to exercise the larger number of peremptory challenges. One peremptory challenge based on meaningful investigation is worth at least two which must be exercised on the sole basis of the instinct and experience of counsel.

Another factor to be weighed is the greater likelihood that a given venireman will tend to favor the prosecution rather than the defense. This tendency is particularly strong in federal prosecutions. The remarkably high conviction rate in federal proceedings not only reflects this tendency, but tends to reinforce it with snowball effect. It also indicates that the prosecution suffers no meaningful disadvantage from the fact that defense is presently granted a larger number of peremptories in felony cases.

There is no apparent need for change in this regard, and the implementation of change carries the serious threat of creating rather than eliminating a disparity between the parties. For all of those reasons, the National Association of Criminal Defense Lawyers opposes the amendments to Rule 24.

3. THE AMENDMENT TO RULE 23(c)

The proposed amendment to Federal Rules of Criminal Procedure, Rule 23(c) provides that, in a bench trial, a defendant's request for special findings of fact must be made before the court renders its verdict. The purpose of the amendment is to clearly delineate the time within which a defendant must make such a request so as to resolve the "interesting and apparently undecided question of when a request for findings under Federal Rules of Criminal Procedure, Rule 23(c) is too late. . . ." *United States v. Rivera*, 444 F.2d 136, 138 (2d Cir., 1971).

In *Rivera*, defendant's request was not made until the day after sentence was imposed. The Second Circuit, however, did not reach the question of timeliness, finding the need for special findings to be moot in light of, inter alia, the rather ambiguous defense request and defense counsel's apparent acknowledgment that his request had been met, *Id.* at 138.

A thoughtful defendant would hesitate to request specific findings before the issue of guilt was decided, because he might well suffer for his temerity. Such a request could be viewed as a concession that he expects a finding of guilt.

Despite these consequences, the amendment has been approved by the following committees which have studied the Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, Proposed Rules Government § 2255 Proceedings for the United States District Courts and Proposed Amendment to the Federal Rules of Appellate Procedure: (a) The Committee on Habeas Corpus, 1973 Winter Meeting of the National Association of Attorneys General at 4, Attorney General Evelle J. Younger, Chairman; (b) The Attorney General of New Jersey, Report at 5, Prepared by Appellate Section of the Division of Criminal Justice, Bureau of Research and Planning (September 1973); (c) The Committee of the American College of Trial Lawyers, Report, (February 11, 1974); (d) The Department of Justice; (e) the United States Attorneys; (f) The Advisory Committee on Criminal Rules (August 11, 1975); and (g) the Standing Committee on Rules of Practice and Procedure.

In their approval of the amendment, none of the above groups considered the effect of requiring a defendant to request special findings before the rendering of a verdict. They merely reiterated the belief that setting a definitive time period during which a defendant must request special judicial findings would eliminate the problem of deciding when such a request was not timely made.

The Association of the Bar of the City of New York ("ABCNY") criticizes the amendment for not requiring mandatory, on the record findings consisting "of the same detail as those in civil cases." ABCNY Joint Report at 20. None of these criticisms directly deal with the consequence of requiring a defendant to request special findings before a verdict is rendered. However, adoption of the ABCNY's suggestion that special findings, either oral or written, be made in every nonjury case would obviate the problem. This approach was also recommended in *United States v. Sicilia*, 457 F. 2d 787, 788 (7th Cir., 1972), and *United States v. Rivera*, 444 F. 2d 130, 138 (2d Cir., 1971).

Similarly, the ABA Criminal Justice Section recommends the following changes in Proposed Rule 23(c):

(c) In a case tried without a jury the court shall make a general finding and shall in addition find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein, unless waived by the parties after the general finding.

The Section's suggested modification is a result of its belief that:

Such a request by the defense or prosecution in advance of the court's decision as to the general finding might well indicate a lack of confidence in a favorable outcome of the case—and could, in fact, affect the court's decision as to the general finding. The Section believes no convincing reason exists for requiring such an advance request. ABA Report at 5-6.

Because a defendant will only request special findings if he or she believes there is a chance that the judge will find him or her guilty, a request for special findings made at the beginning of trial puts the defendant at an immediate psychological disadvantage. It also runs the risk of antagonizing or otherwise unfavorably affecting the trial judge, especially if the request is interpreted as either a lack of faith in the judge's ability to remain neutral or a lack of faith in the defendant's innocence.

Thus, the amendment as presently drafted, offers a defendant a ubiquitous Hobson's choice. The importance of the defendant's right to request special findings makes the imposition of such a choice intolerable. The Ninth Circuit has ruled that:

[A] defendant's right to such findings [special findings under Rule 23] is not trivial, and his exercise of that right is not to be impaired by the exertion of pressure from the court. *Howard v. United States*, 423 F. 2d 1102, 1104 (9th Cir., 1970).

Although the Ninth Circuit was referring to the trial court's conditioning of a jury waiver on a waiver of special findings, its reasoning is equally applicable to the impossible "choice" set out in proposed Rule 23(c). Moreover, a requirement of mandatory findings would "prevent courts from engaging in the condemned practice of conditioning waiver of a jury trial upon waiver of special findings. See *United States v. Livingston*, 459 F.2d 797 (3d Cir., 1972) . . ." ABCNY Joint Report at 21 n. 2.

Significantly, special findings are considered so important in civil cases that the court is required to make such findings in every case. Fed. R. Civ. P., Rule

52(a). The importance of such findings would seem to be even greater where an individual's liberty is at stake.

Furthermore, as the ABA Section on Criminal Justice notes:

At the time the court makes the general finding, it certainly knows its reasons for the action, and can then either orally before a court reporter, or in writing, set forth the facts forming the basis of the decision, unless both parties agree to waive such special findings.

We also note that such proposal would not result in any increased burden upon district judges, especially since such findings could be made orally from the bench and the court reporter's transcript of the judge's remarks would comply with the rule.

Alternatively, we suggest that the problem could be alleviated by amending Rule 23(a) to permit the defendant to request findings of fact and conclusions of law subsequent to the entry of a general verdict. That certainly would not imply any delay in appellate review. Normally, a considerable period of time elapses between a finding of guilty and sentencing. Weeks are required to permit the preparation of the pre-sentence investigative report. Ten days after sentencing are allocated for the filing of a notice of appeal and in most Circuits, local rules prescribe a specific period of time (i.e., two weeks) after the notice for the designation of the record. Findings would not normally be useful to anyone until the clerk of the district court begins to prepare the record on appeal.

Such a procedure would eliminate the necessity for any findings at all in a number of cases. The only value of findings of fact and conclusions of law concerns appellate purposes. There is no reason why any defense lawyer would wish to have special findings entered in any case in which he and his client have determined there will be no appeal. Frequently, that decision as a practical matter is made after, not before, sentencing. Frequently, a defendant who adamantly expresses a desire to subject a district judge's finding of guilt to appellate review, changes his mind after he is sentenced to a period of probation, and the cost of appeal is considered. Permitting defendants to seek special findings subsequent to sentencing would serve the interests of judicial economy by eliminating the need of preparation of findings of fact and conclusions of law in those cases entirely.

For all of those reasons we oppose the proposed changes in their present form and recommend either that the rule be made mandatory in all non-jury cases or that a defendant be permitted to request findings of fact and conclusions of law within a reasonable period of time after sentencing.

4. AMENDMENTS TO RULE 40.1

The only objection the Association has to the proposed Rule 40.1 concerns the unrealistic ten-day time limit within which the petition for removal of state criminal cases to the federal court must be filed. Candidly, we think that such a time limitation is unworkable and unwise and may operate to deny substantial justice in those few cases arising within the ambit of the proposed rule.

We note that most criminal removal cases arise from a situation in which a federal agent runs afoul of some State criminal provision. see e.g., *Colorado v. Symes* 286 U.S. 510, *Maryland v. Soper*, 270 U.S. 9, *Tennessee v. Davis*, 100 U.S. 257. In such situation, the most influential factor in determining whether a case brought by a state indictment is properly removable to the federal court for trial concerns whether the alleged criminal activities of the federal agent or employee occurred during the course of his duties as a federal employee.¹ If so, the case is properly removable. If not, the case should remain within the jurisdiction of the state court.

But the question of whether the activities occur in the course of a defendant's federal duty is one about which there can be significant disagreement. Questions may arise which take more than ten days to resolve. The question of representation in such cases is also involved. Should the Department of Justice determine that such activity as charged in a state indictment occurred in the course of the defendant's duties as a federal agent, it would similarly decide to provide representation for him by a departmental attorney or an Assistant U.S. Attorney.

¹In some such cases the proposed rule would be inoperable in any event since the Supreme Court held long ago in *Cunningham v. Neagle*, 135 U.S. 1, that federal habeas lies to obtain the discharge of a federal officer held by State authority for a homicide committed in the course of his federal duties. The proposed rule does not purport to regulate the habeas jurisdiction of the district courts.

Otherwise, the defendant would be put to the necessity of retaining private counsel. But the department may determine that the alleged deed did not occur in the performance of the defendant's duties and he, on the other hand, may insist that it did. In such circumstances the question of who shall represent the defendant could not be determined within ten days. Whoever that attorney is, he deserves a fair opportunity to prepare and file a petition for removal. The ten-day provision is simply unworkable. Nor does it serve any useful purpose. Rare indeed is the case that is brought to trial in ten days. No delay, therefore, would result from a more generous and realistic allocation of time to such defendant to determine, first, by whom he is to be represented and, second, whether to file a petition for removal. The National Association of Criminal Defense Lawyers believes that all defendants should be given a full and fair opportunity to litigate their just claims—even federal agents.

5. AMENDMENTS TO RULE 41

While we recognize that nothing in the text of a federal rule of criminal procedure could properly be construed as altering a constitutional requirement, we nevertheless feel that the language in the proposed Rule 41(c) (1), "the finding of probable cause may be based on hearsay evidence in whole or in part," may be misleading in that it fails to take specific account of the requirement that the magistrate be provided with a reason to credit the hearsay. Such decisions as *Aguilar v. Texas*, 378 U.S. 108, *Spinelli v. United States*, 393 U.S. 410, and *United States v. Davis*, 402 F.2d 171, (7th Cir., 1968), stand for the proposition that while hearsay suffices to establish probable cause, it is necessary to show something more than a mere informant's tip. That something more we suggest can constitutionally take many forms, e.g., a recitation of the informant's prior reliability, his identity and standing in the community, or even the fact that he was in a position to personally observe what he told the affiant. See *Adams v. Wilhams*, 407 U.S. 143. Accordingly, we suggest that the quoted language—which really adds nothing to existing law—be deleted from the rule in its entirety, or alternatively, that qualifying phraseology be added to make certain that the constitutional requirement to which we have referred is given recognition in the Rule.

The other aspect to the proposed Rule 41 to which our objection is most important concerns the decision to permit search warrants to issue upon telephonic affidavits. First, we believe that the fundamental idea of telephonic affidavits is less than satisfactory. It deprives the magistrate of one of the most traditional methods by which credibility of witnesses has been judged in the law. Considerations of demeanor are totally eliminated. In addition, problems may arise concerning the identity of the caller as well as proving the identity of the caller. Unless the magistrate can recognize the voice of the affiant, there would appear little chance of attaching responsibility for the seeking of a search warrant upon an individual who seeks it by telephone. In the opinion of our membership, the recording requirement of the proposed rule would be of little help in this respect.

The other provision of proposed Rule 41(c) (2) to which we object concerns the language in the very beginning of the proposed rule: When the circumstances make it reasonable to do so in the absence of written affidavit.

We believe that clause sets too nebulous and lax a standard for the invocation of the telephonic procedure. Even the proponents of the rule change should prefer written sworn affidavits and oral sworn personal testimony before a magistrate in instances where that can be accomplished conveniently. Under the standard of the clause we have quoted, we apprehend that search warrants will usually be issued by telephone rather than by personal application. What is meant to establish a mechanism for use in the unusual case will become the mechanism utilized in almost every case. The tail will wag the dog. We suggest, in the alternative, that the rule be written to contain a standard based upon the practicality of seeking a warrant in person and that agents be required to seek the warrant in person when they are able to do so. Under such a standard, exigent circumstances could be considered and the telephonic procedure utilized only when the normal, usual, and time-tested personal appearance will not serve.

Once again, we fear the Fourth Amendment's vital protection against unreasonable search and seizures is demeaned by the proposed rule. We fear that this basic protection is in serious danger of becoming a second class constitutional right.

6. PROPOSED AMENDMENTS TO RULE 6

We are conversant with the statement submitted to this Subcommittee by Professor Melvin B. Lewis, of the John Marshall Law School, and we concur in the sentiments he professes in connection with Rule 6. In short, the National Association of Criminal Defense Lawyers opposes the amendments to the rule regarding the secrecy of grand jury proceedings.

7. CONCLUSION

For the reasons which we have discussed above, the National Association of Criminal Defense Lawyers, composed of those attorneys practicing in every State in the Union, who practice in the criminal courts of the nation on a daily basis, opposes the proposed amendments of the Federal Rules of Criminal Procedure promulgated by the Supreme Court. We urge the Subcommittee to recommend against the passage of those amendments.

Mr. MANN. The other witness scheduled today was Mr. Lennox Hinds, who was to testify on behalf of the National Conference of Black Lawyers. He is unable to be here, and will submit a statement for the record.

Without objection it will be received and made a part of the record. [Mr. Hinds' statement follows:]

STATEMENT OF THE NATIONAL CONFERENCE OF BLACK LAWYERS

INTEREST OF THE NATIONAL CONFERENCE OF BLACK LAWYERS

The National Conference of Black Lawyers, (NCBL), is a national, not-for-profit, non-partisan, non-political membership organization incorporated under the laws of the District of Columbia. Its membership consists of over 1,000 of the nation's 5,000 Black lawyers, judges, and law professors. Also included in its membership are over 2,500 Black law students through the Black American Law Students Association (BALSA). As stated in its Articles of Incorporation, the purposes of NCBL are:

1. To work for the elimination of racism in the law.
2. To give attention to the root problems of the Black Community.
3. To analyze and study problems of Black attorneys in the United States in their legal practices.
4. To encourage Black youth to study law.
5. To cultivate the science of Jurisprudence to facilitate the administration of justice; to elevate the standards of integrity, honor, and courtesy in the Legal profession; and to cherish the spirit of brotherhood among the members thereof.

One of the overriding concerns of national significance is the concerted effort of the judiciary, the legal profession, and the legislature to improve the criminal justice system of our nation. Member attorneys of the Conference have enjoyed extensive experience in the federal courts, and, therefore have a real interest in the rules of procedure employed therein. The proposed amendments to the Federal Rules of Criminal Procedure are especially of importance in that, if allowed to become law, they will affect the basic tools of the legal profession's efforts to facilitate the administration of justice.

PROPOSED AMENDMENT TO RULE 24(b)

The National Conference of Black Lawyers is opposed to the proposed amendment to Rule 24(b) of the Federal Rules of Criminal Procedure, as it will adversely affect the Sixth Amendment right of the accused to an impartial jury trial. The reduction of the absolute number of peremptory challenges available to both sides in all federal criminal trials to 12 challenges in capital cases, nine challenges in felony cases, and two challenges in misdemeanors would not enable defendants to achieve a jury free of bias against the accused.

The Conference's analysis of the effect of the proposed amendment to Rule 24(b), reveals that substantial prejudice to the defense function will result in federal criminal trials where the limited opportunity of voir dire has virtually extinguished the "cause challenge" as a tool for minimizing jury partiality. To reduce the number of peremptory challenges, which have traditionally been

regarded as basic to achieving an impartial jury, would aggravate the predicament of the defense in cases in which pretrial events have received extensive media coverage.

On Wednesday, February 23, 1977, Jay Schulman, coordinator of the National Jury Project testified in opposition to the proposed amendment to Rule 24(b). The National Conference of Black Lawyers fully supports the substance of the National Jury Projects statement and testimony on the issue, and we vigorously urge that the Subcommittee restrain from reporting out a bill embodying the proposed amendment to Rule 24(b) of the Federal Rules of Criminal Procedure.

Moreover, the Conference asserts that the composition of federal jury systems throughout the nation substantially underrepresents young and non-white people, and that the reduction of the number of peremptory challenges would deny federal defendants the opportunity of a jury composed of their peers. In order to develop a genuinely inclusive federal jury system with enough peremptory challenges to screen a jury panel of prejudice, we believe that more peremptory challenges, rather than less, should be the substance of any change in Rule 24(b).

In conclusion, the National Conference of Black Lawyers invariably stands by the proposition that the Sixth Amendment guarantee of an impartial jury will suffer an evisceration if the proposed amendment to Rule 24(b) of the Federal Rules of Criminal Procedure is reported out of the Subcommittee in its present form.

Mr. MANN. The subcommittee has received several statements for inclusion in the record. Copies of them were circulated to members of the subcommittee yesterday afternoon, and without objection, they will be made a part of our record.

Hearing no objection, the following items are made a part of our record:

One, a letter from David R. Freeman, Federal Public Defender, Western District, Mo., dated February 23, 1977;

Two, a letter from Shelby C. Kinkad, Jr., Federal Public Defender, Lexington, Ky., dated February 23, 1977;

Three, a statement on behalf of the National Association of Manufacturers forwarded in a letter dated February 23, 1977, from Richard D. Godown; and

Four, a letter from William Deaton, Federal Public Defender, Albuquerque, N. Mex., dated February 23, 1977.

[The four documents follow:]

FEDERAL PUBLIC DEFENDER,
WESTERN DISTRICT OF MISSOURI,
Springfield, Mo., February 23, 1977.

Re proposed changes—rule 24, Federal rules of criminal procedure.

Hon. JAMES R. MANN,

Subcommittee on Criminal Justice, House Judiciary Committee, House Office Building, Washington, D.C.

DEAR MR. MANN: I write in opposition to the proposed revision of Rule 24, Federal Rules of Criminal Procedure.

I am in agreement with those persons who suggest that the method of selecting petit jurors in a criminal case should be thoroughly reviewed. But I challenge the bare conclusion that reducing the number of peremptory challenges or placing the defendant and the Government on parity in the number each side is entitled to exercise will achieve the policy of the 1968 Jury Act of insuring that all litigants "shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the Court convenes." 28 U.S.C. § 1861.

The committee on the operation of the jury system believes that reducing the number of peremptory challenges would prevent misuse of the challenge for purposes of systematically excluding members of a given group from the jury. Based on my experience over the years and the experience of my assistants in defending criminal cases in this district, I am simply unable to see how the laudatory ends sought by the committee will be facilitated in any degree by reduc-

ing the number of peremptory challenges available to a defendant or making the number of peremptory challenges equally available to both parties in a criminal case.

Only a defense lawyer who has sat at the council table with a black defendant, whose family and friends are seated in the back of the courtroom, can fully appreciate the impact of these people seeking Negro veniremen, who appear to be normal law-abiding, hard-working citizens of their community, struck from the jury by the Government for no other apparent reason than their race. We recently challenged this practice in this district in *United States v. Carter*, 528 F.2d 844 (8th Cir. 1975) and *United States v. Nelson*, 529 F.2d 40 (8th Cir. 1976), copies enclosed.¹ The challenges were unsuccessful in light of the standard announced by the Supreme Court in *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L.Ed.2d 759 (1965), requiring a showing of consistent and systematic exclusion of Negroes by the exercise of peremptory challenges in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be. Nevertheless, the Eighth Circuit Court of Appeals did characterize the prosecutor's practice as raising a "serious question" and stated in *United States v. Nelson*, *supra*, at p. 43,

"Should the prosecutors' practices, as revealed here and in *Carter* continue, we are sure that the district judges in the Western District of Missouri will take appropriate action."

The point is that it is not the defendant in actual practice in the trial of a criminal case who is responsible for the destruction of the cross-sectional flavor of the jury. The proposed change to Rule 24 will do nothing to remedy this deplorable practice. In a non-capital felony case reducing the number of qualified jurors from twenty-eight to twenty-two before exercise of peremptory challenges does nothing to promote a "fair cross-section". If anything reducing the size of the qualified panel correspondingly reduces the likelihood of a "fair cross-section". The insignificant savings in time and money in the jury selection process by reducing the number of peremptory challenges and therefore the size of the qualified panel is far outweighed by the fundamental right of a defendant to have his jury selected from a fair cross-section of the community.

Historically the concept of jury challenges was looked-upon as a protection for the accused rather than a right of the prosecutor. See the attached brief, pages 17 through 35 filed in *United States v. Carter*, *supra*, and prepared by Thomas M. Bradshaw, Assistant Federal Public Defender for this district, for historical data.²

The jury selection process in this district in the ordinary single-defendant felony case takes approximately 2 to 2½ hours from the time the panel of veniremen is sworn until the twelve members of the jury are selected. The judge invites the Government and the defendant to submit proposed voir dire questions. Uniformly, it is the practice in this district for the defendant to submit proposed questions to be propounded to the panel, the Government submits no requested questions for voir dire. If the judge does not like a particular question that has been propounded by defense counsel he does not necessarily state that the question is improper but will ordinarily say that he will cover the subject matter in a different way, which usually means that the subject matter of the inquiry is so obscured that it evokes no response from the prospective venireman.

I've been a Federal Public Defender for over four years. Prior to that time I spent over five and one-half years trying major felony criminal cases in the State Courts of Missouri where the lawyers conduct the voir dire examination. I know from that experience it is possible for two capable lawyers to conduct a voir dire examination, within the bounds of propriety, in a shorter period of time than a federal judge and, at the conclusion of the questioning period be able more intelligently to exercise challenges on behalf of their respective clients.

In conclusion, I want to emphasize that we have no difficulty in this district in obtaining a panel of veniremen that represent a true cross-section of the community. The names placed in the wheels for our grand and petit juries in this district are selected at random on an annual basis from the voter registration list. There is substantial minority representation on each panel of veniremen. The prosecutor's practice of eliminating, in the name of the sovereign, minority representation on juries may not meet the "systematic exclusion" standard but it does without question smack of "tokenism" and should not be further

¹ These cases are not being reprinted.

² The brief is reprinted in app. 3 at p. 254.

facilitated by the proposed change to Rule 24. In short, the proposed change will further degrade the quality of justice available to an accused in the federal courts of this country and it is on that score that history will judge our civilization.

Respectfully yours,

DAVID R. FREEMAN,
Federal Public Defender.

Enclosures.

LEXINGTON, KY., February 25, 1977.

Re proposed change—rule 24, Federal rules of criminal procedure.

Hon. JAMES R. MANN,

Subcommittee on Criminal Justice, House Judiciary Committee, House Office Building, Washington, D.C.

DEAR CONGRESSMAN MANN: The purpose of this letter is to voice opposition to the proposed change for Rule 24 of the Federal Rules of Criminal Procedure reducing the number of peremptory challenges to five per side.

I do not believe that the reasons cited by the Committee for such a change are valid and, therefore, do not feel that the proposed Rule is desirable.

Our office has never used peremptory challenges as a means of systematic elimination from the jury of members of a given group. We have only used challenges to eliminate those individuals from the jury whom we believe exhibit a predisposition as to the matter on trial or an inability to be objective. It is the practice in our District to retain a panel of veniremen for up to [and in some instances in excess of] six months. Toward the end of a period of jury service peremptory challenges become exceedingly important because of the need to eliminate those jurors who would be inclined to form an opinion as to the matter on trial based upon their prior experience in similar cases. Frequently, an attorney's decision that a juror would not be receptive to or objective about a defendant's case is intuitive and such a juror must, therefore, be eliminated by way of a peremptory challenge rather than for cause.

I do not believe a reduction in the number of peremptory challenges would facilitate a savings of time. On an average our office tries in excess of 25 cases a year and in our District the attorneys are allowed to individually voir dire the jurors. I do not recall having a case in which the jury selection process took more than two hours. Even if the proposed Rule might result in a savings of time, I don't believe that ends of justice are necessarily best served by a streamlined judicial system.

Finally, I don't believe that the disparity as to the number of challenges provided to the defense and the prosecution works an injustice. In the case of privately retained defense counsel the government, because it has been involved in all of the cases tried by the panel, is more familiar with the background of individual jurors than is the defense and can exercise its challenges with more discretion and, consequently, does not have the need for as many challenges as the defense. Moreover, the Sixth Amendment right to a jury trial by one's peers inures to the benefit of the defense rather than the government.

In closing, I strongly urge that the Committee decline to approve the proposed change for Rule 24.

Sincerely,

SHELBY C. KINKEAD, Jr.,
Federal Public Defender.

COMMENTS OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers ("NAM") respectfully submits these comments on the proposed amendments to the Federal Rules of Criminal Procedure now before this Committee. We will limit our comments to proposed Rule 6(e), Secrecy of Proceedings and Disclosure, amendment.

The NAM is a voluntary, non-profit business organization whose members include employers of all sizes and account for a major portion of all manufacturing business in the United States. Any of our members could become the object of abuses of the grand jury system engendered by the proposed amendment, as all are subject to the jurisdiction of at least one administrative agency. It is to these abuses which we direct our comments.

The amendment to Rule 6(e) offered by Mr. Chief Justice Burger would permit disclosure of grand jury transcripts to such government personnel, other than the Attorney General, U.S. Attorney or their authorized Assistants, as is necessary to assist these specific attorneys in performing their duties. The rationale advanced for this disclosure expansion by the Advisory Committee to the U.S. Judicial Conference is to "facilitate an increasing need on the part of government attorneys, [that limited class to which the grand jury transcripts may now be disclosed] to make use of outside expertise in complex litigation." H.R. DOC. NO. 94-464, 94th Cong., 2d Sess. 8 (1976).

The NAM is concerned that the proposal will undermine the "long established policy that maintains the secrecy of the grand jury in Federal courts." *United States v. Proctor and Gamble Co.*, 356 U.S. 677 (1958). The grand jury, a constitutionally authorized and court supervised entity, is a powerful mechanism, the use of which circumvents many of the rights of the party under investigation. There is no right to have counsel present in the grand jury room, no notice of the charges against the party is given, and testimony can be compelled by a grant of either use of transaction immunity. These extreme exceptions to the principles of freedom are justified only because of "the importance society has attached to detecting criminal activity and bringing to justice those responsible." Note, "Administrative Agency Access to Grand Jury Materials," 75 Colum. L. Rev. 162, 177 (1975). However, if the proposal is adopted it is possible that the information acquired in the criminal grand jury setting and made available to those administrative agency personnel assisting in the criminal investigation will be used by the administrative agency in subsequent enforcement proceeding of its own, either civil or criminal.

The Advisory Committee itself acknowledged the potential for that very kind of abuse, should the grand jury materials be permitted to be more broadly disclosed; disclosure to personnel whose expertise is needed in the criminal investigation "is subject to the qualification that the matters disclosed be used only for the purposes of the grand jury investigation." H.R. Doc. at 9. The Committee did suggest a method to promote the secrecy of the testimony and lessen the opportunity for abuse of that information by the administrative agency assisting in the investigation.

"The court may inquire as to the good faith of the assisting personnel, to ensure that access to material is not merely a subterfuge to gather evidence unattainable by means other than the grand jury." H.R. Doc. at 9.

The NAM, does not believe that the precatory comments of the Advisory Committee will adequately protect persons who are subject to the jurisdiction of administrative agencies from the unfairness inherent in the proposed amendment. We respectfully submit that at a minimum rule 6(e) require a judicial determination, made after an adversary hearing, that compelling and particularized needs of the Justice Department justify the disclosures of specific grand jury materials and that those disclosures are made to the minimum possible number of additional government personnel. A judicial determination of necessity for the expert assistance is essential. It is undesirable to have the Attorney General or U.S. Attorney who is directly involved in the criminal prosecution make the decision as to whether administrative agency assistance is necessary.

Several criteria that must be met by the Justice Department in order that a limited disclosure order issue were discussed in *J. R. Simplot Co. v. United States District Court for the District of Idaho*, —F. 2d— (9th Cir. 1976). See also, *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D.Pa. 1975). In order for the interest in permitting agency personnel to assist in the grand jury investigation to outweigh the societal interests in preserving grand jury secrecy and use for the sole purpose of handing down indictments, the Department of Justice must satisfy the court as to the "necessity for each particular [agency] person's aid rather than showing merely a general necessity for assistance, expert or otherwise." *Simplot*, slip opinion at 9. The *Simplot* opinion places a desirable additional burden upon the Justice Department. No agency assistance will be permitted unless the Department adequately explains its "failure to use qualified personnel within the Justice Department." *Ibid*. This requires the Department to look first to its own substantial resources for assistance and prevents the administrative agency from automatic access to the grand jury investigation.

We believe that the adversary hearing standards set forth in *Simplot* should be incorporated into any amendment which expands the grand jury materials disclosure provisions of Rule 6(e). These criteria must be incorporated into the

rule as they enhance the societal interests in grand jury secrecy, freedom of the individual under criminal investigation and curtailing administrative agency use of information obtained in the criminal forum for its own civil enforcement activities. Moreover, an adversary hearing must be mandatory in order to ensure that the balance between the prosecutor's alleged need for outside, expert aid and the secrecy of the grand jury proceeding be fairly struck.

The NAM is grateful to the Committee for being permitted to submit its views on this proposal, the practical effect of which will be to greatly alter the investigatory procedures of administrative agencies.

FEDERAL PUBLIC DEFENDER,
DISTRICT OF NEW MEXICO,
Albuquerque, N. Mex., February 25, 1977.

Re proposed changes in rule 24, Federal rules of criminal procedure.

HON. JAMES R. MANN,
Subcommittee on Criminal Justice, House Judiciary Committee, House Office Building, Washington, D.C.

DEAR CONGRESSMAN MANN: For the past four years I have worked as an attorney in the Federal Public Defender Office for New Mexico which handles between 60-75% of the indigent federal criminal matters in this judicial district. I am acutely conscious of the necessity for an effective legal system. I firmly believe that a sine qua non for such a system is the ideal of fairness; or, at the very best, the "appearance of fairness."

One of the few places in a criminal process where there is a visible "advantage" given the defendant is in the number of peremptory challenges presently allowed under Rule 24. The idea of achieving some sort of "parity" between the government and an accused person by changing the number of peremptory challenges has to be viewed in the context of the resources and investigative potential of each side. When so viewed, the overwhelming dominance of the government is obvious.

Under the proposed rule, an accused would have to rely on the trial court's discretion in allowing more than the reduced number of peremptory challenges. Presumably this is the same judicial discretion that is presently being attacked by those persons who advocate fixed mandatory sentences to cure the disparities in sentencing created by judicial "discretion."

I respectfully submit to you that if we seriously entertain the concepts of trial by jury, a fair trial, and due process of law, the number of peremptory challenges presently allowed a federal criminal defendant is already at an irreducible minimum.

Respectfully yours,

WILLIAM W. DENTON,

Mr. MANN. Several persons have contacted the subcommittee, inquiring about how long the record will be kept open for the receipt of statements about the proposed amendments.

The Chair announces that, unless there is objection, the record will be kept open until Tuesday, March 15. Is there objection?

Hearing none, the record shall remain open until March 15.

The subcommittee will now stand adjourned until tomorrow, March 3 at 9:30 a.m., in room 2237, Rayburn House Office Building, when we will meet to decide whether legislation on the proposed amendments is appropriate.

The subcommittee stands adjourned.

[Whereupon, at 1 p.m., the hearing was adjourned.]

APPENDIXES

APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOS. 76-1893 AND 76-1995

IN RE: GRAND JURY J.R. SIMPLOT CO., SIMPLOT INDUSTRIES, INC., ET AL.,
PETITIONERS-APPELLEES

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO AND UNITED STATES
OF AMERICA, RESPONDENTS-APPELLEES

INTERNAL REVENUE SERVICE, REAL PARTY IN INTEREST

OPINION—NOVEMBER 12, 1976

Appeal from the United States District Court for the District of Idaho

Before: HUFSTEDLER and CHOY, Circuit Judges, and KING,* District Judge.
HUFSTEDLER, Circuit Judge:

This appeal raises important issues about the civil use of grand jury materials by administrative agencies providing technical assistance to the prosecutor and to the grand jury. For the reasons given below, we hold that the denial in this case of the motion to vacate the Rule 6(e) order (Fed. R. Crim. P. 6(e)) is appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.* (1949) 337 U.S. 541. We also hold that the order impermissibly compromised both the secrecy and independence of the grand jury, requiring vacation of the order and remand to the district court.

For two or three years prior to convening the grand jury in this case the Internal Revenue Service (IRS) had been investigating the civil tax liability of J. R. Simplot Co. (J.R. Simplot) and Simplot Industries, Inc. (Simplot, Inc.) (both sometimes called Simplot). The investigation was a large scale operation as Simplot, Inc. has 18 or 19 subsidiaries and J. R. Simplot has three divisions. Total assets of the two components of Simplot exceed \$175 million, and annual sales also exceed \$175 million. The tax relationship between the components is very complex because J.R. Simplot is a privately held company with only four or five shareholders, while Simplot, Inc. is a publicly held corporation.

The grand jury was empaneled sometime in September 1975. On October 2, 1975, the Government made a motion under Rule 6(e) to allow disclosure of grand jury materials and transcripts to certain IRS personnel, "in order that an analysis of the testimony, books and records may be undertaken by Internal Revenue Service [personnel] in order to assist the Grand Jury in its investigation into whether or not there have been criminal [tax] violations..."¹

This motion was granted on December 17, 1975, and during the same period, Simplot was responding to grand jury subpoenas. The order granting the October 2 motion limited IRS use of the information obtained to assisting the grand jury; use in any civil context was expressly prohibited. The Government made a motion for additional disclosure on March 3, 1976. The motion was granted *ex*

*Honorable Samuel P. King, United States District Judge, District of Hawaii, sitting by designation.

¹ Brief for Appellee at 3.

parte and superseded the earlier order. This order had no restriction on the use of grand jury information for civil tax purposes. Two days of hearings were held after *Simplot* filed a motion to vacate the March 3 order. The superseding order authorized disclosure to 24 named employees of the IRS. *Simplot* appeals, or in the alternative seeks mandamus, to overturn the order of March 3, 1976.

I.

Appealability has usually been found wanting when a witness challenges orders granting or denying disclosure of grand jury materials while the grand jury is still in session. The general rule requires the claimant to raise the issue in the main criminal proceeding (via a motion to suppress), by way of defense in a contempt prosecution after noncompliance, or by way of motion to suppress when the disclosure is used in subsequent civil litigation. (See *DiBella v. United States* (1962) 369 U.S. 121; *Cobbledick v. United States* (1940) 309 U.S. 323, 327.) The rule avoids disrupting the grand jury's investigation and achieves efficiency by denying piecemeal appeal.

Review has been allowed when its absence would leave the appellant "powerless to avert the mischief of the order." (*Perlman v. United States* (1918) 247 U.S. 7, 13; see also *United States v. Ryan* (1971) 402 U.S. 530, 533 ("Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exception to this principle.")) In the case at bar, the breach of grand jury secrecy resulting from the grant of the district court's Rule 6(c) order can never be repaired.² As with other privileged communications, the very fact of loss of confidentiality inhibits future communication regardless of the use to which the information is put. As Judge Lumbard observed:

[I]t is blithely suggested that the orders here "may still be reviewed upon an appeal [from the civil suit]." While this may be true in a technical sense, the release of the grand jury minutes here will, in practical terms, foreclose any later, meaningful appeal. A subsequent determination by this court that grand jury secrecy should have been preserved will not undo the damages to the principle of secrecy which will have been done by the dissemination of the testimony. (*Baker v. United States Steel Corp.* (2d Cir. 1974) 492 F. 2d 1074, 1080-81 (Lumbard, J., dissenting).)

Among the policies served by grand jury secrecy in *Simplot* are two which would be irretrievably lost under post-disclosure review. Both the need "to insure the utmost freedom to the grand jury . . ." and the need to encourage free and untrammelled disclosure . . . before the grand jury are permanently frustrated once disclosure occurs. (*United States Industries, Inc. v. United States District Court* (9th Cir. 1965) 345 F. 2d 18, 22 (quoting *United States Amazon Ind. Chem. Corp.* (D. Md. 1931) 55 F. 2d 254).)

However, mindful of the drawbacks of interlocutory appeal,³ we hold only that *Simplot* has made a showing sufficient to make review appropriate in the case. Because the grand jury is still in session and the existence of a potential civil tax proceeding has been shown, there is a significant issue of grand jury independence. (See Note, "Administrative Agency Access to Grand Jury Materials" 75 Colum. L. Rev. 162, 166 (1975) [hereinafter cited as "Agency Access"].) The fact that no indictment has been returned is also significant.⁴ On the one hand, the lack of indictment leaves open the possibility of loss of independence, while on

² Review of the Rule 6(c) order in *Simplot* is not, as the Government contends, in effect a motion to suppress. Here the grand jury is not being denied any data, and legitimate needs to have experts process the data for presentation to the grand jury will not be frustrated.

³ Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigations and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States v. Dionisio* (1973) 410 U.S. 1, 17.

⁴ The lack of an indictment distinguishes *Simplot* from cases such as *In re Special March 1974 Grand Jury* (7th Cir. Aug. 24, 1976) (Nos. 76-1372 & 76-1418) (also distinguishable because it failed to consider alternatives other than quashing subpoena or disclosure to defendant); *Baker v. United States Steel Corp.* (2d Cir. 1974) 492 F.2d 1074, 1078; and *In re Grand Jury Investigation of Violations of 18 U.S.C. § 1621* (Perjury) (2d Cir. 1963) 318 F.2d 533.

Once the grand jury has terminated an investigation by returning an indictment, disclosure can be had only under the second sentence of Fed. R. Crim. P. 6(e) upon a showing of "particularized and compelling need." *U.S. Industries, Inc. v. United States District Court* (9th Cir. 1965) 345 F.2d 18, 21. Disclosure for use in a civil proceeding is appealable as it is an independent proceedings for discovery. 9 J. Moore, *Moore's Federal Practice* ¶ 110.13[11] at 103 (2d ed. 1976).

the other hand, the possibility that there may be both no indictment and no civil proceeding creates a danger of an otherwise irremediable breach of secrecy. These features of Simplot's appeal have convinced us that grand jury independence and secrecy are at issue.

Under these circumstances, the grant of a Rule 6(e) disclosure order is an appealable, final order under *Cohen v. Beneficial Industrial Loan Corp.* (1949), 337 U.S. 541, 546. If irreparable breaches of secrecy are possible, Rule 6(e) orders fall within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." (*Id.*) Decision on Rule 6(e) orders will dispose of a "matter separate from the merits of the case." (*Norman v. McKee* (9th Cir. 1970), 431 F. 2d 769, 773.) Irreparable breaches of grand jury secrecy create a sufficient "danger of denying justice by delay" to outweigh "the inconvenience and costs of piecemeal review. . . ." (*Id.* at 774.) Viewing Rule 6(e) orders as worthy of direct review is a continuation of the practice of giving 28 U.S.C. § 1291 appealability a "practical rather than a technical construction." (*Cohen, supra*, at 546.) It is appropriate to review these orders because as a practical matter such orders will be otherwise unreviewable.⁶

II.

Rule 6(e) provides access to grand jury materials for "attorneys for the government for use in the performance of their duties." Indiscriminate expansion of "attorneys for the government" to include agency personnel whenever it suits the convenience of the United States Attorney would blur the distinction between criminal and civil investigations. Blurring this distinction gives the agency "a much greater incentive to try to persuade the grand jury to investigate matters which are beyond its proper role but of interest to the agency." ("Agency Access," *supra*, at 166.) Also, the taxpayer is subjected to an unfair deprivation of rights when taxes are extracted by abuse of the criminal process.

The IRS possesses a broad arsenal of investigative tools for discovering civil tax liabilities. (*See United States v. Bisceglia* (1965), 420 U.S. 141; 26 U.S.C. §§ 7602-06.) In creating these weapons, Congress provided what it believed was necessary to protect the public fisc. Congress did not see fit to grant the IRS access to grand jury materials in criminal tax investigations. In addition, the grand jury is a constitutional entity under court supervision, not a tool available for Executive branch purposes. ("Agency Access," *supra*, at 175-84.)

The grand jury has powers reaching far beyond those of the IRS.⁷ The justification for these powers is the singlemindedness of the grand jury's function in accusing individuals of criminal acts. "It is critical that the offenses be crimes, because the only justification, if any, for the grand jury's massive intrusions upon freedom and privacy is the importance society has attached to detecting criminal activity and bringing to justice those responsible." ("Agency Access," *supra*, at 177.) That function is not served and the justification is inapplicable when grand jury material is used for civil tax liability. Such use is in itself an abuse of the grand jury.

The taxpayer also has rights that are circumvented by civil use of grand jury material. Use of the grand jury means that the taxpayer is not entitled to notice as to any charges against him.⁸ The taxpayer's right to refuse to answer irrelevant questions is severely restricted.⁹ He has no right to have counsel before the grand jury,¹⁰ and his testimony can be compelled by grant of immunity.¹⁰

⁶ *Coson v. United States* (9th Cir. 1976) 533 F. 2d 1119, is not inconsistent with the result reached here. Although there is some dicta in *Coson* implying that interlocutory review is unavailable, *Coson* is distinguishable both because the issue of interlocutory review was not before the *Coson* court (*Coson* was an appeal from a contempt proceeding) and because there was no showing of a potential civil use in *Coson*. *See id.* at 1120.

Also, at least one circuit believes the collateral order doctrine is more expansive in the grand jury context. *In re Investigation Before April 1975 Grand Jury* (D.C. Cir. 1976, 531 F.2d 600, 605 n.5. This expansive approach is based on the view that the efficiency loss is less because a grand jury can more easily suspend action on a matter and shift to another than can a trial court.

⁷ *United States v. Doo* (S.D.N.Y. 1972) 341 F. Supp. 1350, 1352; "Agency Access," *supra*, at 177.

⁸ *In re Black* (2d Cir. 1931) 47 F.2d 542.

⁹ *Bursey v. United States* (9th Cir. 1972) 466 F.2d 1059, 1076.

¹⁰ *United States v. Scully* (2d Cir. 1955) 225 F.2d 113, 116.

¹⁰ Comment, "Grand Jury Secrecy: Should Witnesses Have Access to Their Grand Jury Testimony as a Matter of Right?" 20 U.C.L.A. L. Rev. 804, 817 & n.71 (1973) [hereinafter cited as *Witness Access*].

Also a grand jury subpoena is not subject to the same limitations as a civil summons.¹¹ Allowing civil use without an adversary hearing and without some strict showing of necessity would raise serious due process problems. As long as the target witness has not been indicted, he or she has no access to his or her own testimony.¹² To allow government agencies access would create a serious inequity in grand jury procedures and would undercut the function of secrecy as a bulwark against unwarranted investigations.

Finally, to the extent that a hearing and a showing of particularized and compelling need are not required, the plain language of Rule 6(e) is distorted. That Rule contemplates that, even when some of the values served by secrecy are no longer present because the investigation is over, disclosure will be permitted only after a showing of particularized need.¹³ Agency access for civil use creates an end-run which violates the second sentence of Rule 6(e), while giving the agency an unfair advantage and a favored position *vis-a-vis* private parties.

Two main points stand out: First, agency assistance to the prosecutor or the grand jury should never be allowed except upon an adversary hearing resulting in a finding that assistance is necessary. Second, the court's duty to safeguard the independence of the grand jury lives beyond that hearing and requires close supervision of the agency's civil use of the information acquired from grand jury materials.

Because the decision to allow disclosure is the result of a balancing process,¹⁴ in appropriate cases the need for allowing agency personnel to assist in the preparation of the presentation to the grand jury will outweigh countervailing values. To meet that standard in a case like *Simplot*, the Government must show the necessity for each particular person's aid rather than showing merely a general necessity for assistance, expert or otherwise. Moreover, absent an explanation for the failure to use qualified personnel within the Justice Department, the Government cannot carry its burden of showing that outside experts are necessary.¹⁵

On the record before us, we are not persuaded that all 24 of the IRS personnel granted access were necessary to the investigation. In any event, the order must be vacated so that the district court can hold a hearing in accordance with the principles expressed here.

To minimize abuse of the grand jury and to safeguard its independence, it is appropriate for the district courts to draw up guidelines¹⁶ to maintain the secrecy of the grand jury assisted by administrative agency personnel.¹⁷ Two require-

¹¹ Comment, "Federal Grand Jury Investigation of Political Dissidents" 7 Harv. Civ. Rts.-Civ. Lib. L. Rev. 432, 448-52 (1972).

¹² See generally 8 J. Moore, Moore's Federal Practice ¶ 16.05[2] (2d ed. 1976); Witness Access, *supra* note 10.

¹³ E.g., *Baker v. United States Steel Corp.* (2d Cir. 1974) 492 F.2d 1074 (use by private plaintiff in antitrust suit); *Special February 1971 Grand Jury v. Conlisk* (7th Cir. 1973) 490 F.2d 894 (use in police disciplinary hearings); *U.S. Industries, Inc. v. United States District Court* (9th Cir. 1965) 345 F.2d 18 (use by private plaintiff in antitrust suit); *Allis-Chalmers Mfg. Co. v. City of Fort Pierce, Florida* (5th Cir. 1963) 323 F.2d 233 (semble); *In re Holovachka* (7th Cir. 1963) 317 F.2d 834 (state bar disciplinary proceedings); *Doe v. Rosenberg* (2d Cir. 1958) 255 F.2d 118 (semble); *In re Grand Jury Investigation* (S.D.N.Y. 1976) 414 F. Supp. 74 (SEC failed to show particularized need); *Capitol Indemnity Corp. v. First Minnesota Construction Co.* (D. Mass. 1975) 405 F. Supp. 929 (denied use by AUSA representing HUD in civil suit); *In re Petition for Disclosure of Evidence* (E.D. Va. 1960) 184 F. Supp. 38 (state prosecutor for use in criminal proceedings).

¹⁴ *U.S. Industries, Inc. v. United States District Court* (9th Cir. 1965) 345 F.2d 18, 21.
¹⁵ Fed. R. Crim. P. 54(c): "'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney [and] an authorized assistant of a United States Attorney"

The requirement for a showing of need would remain under the pending amendments to Rule 6(e) which expand "attorneys for the government" to include "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." 44 U.S.L.W. 4549 (emphasis added). Because of the United States Attorney's involvement in the prosecution of the case, he or she cannot be entrusted with passing on the necessity of assistance. *Cf. Coolidge v. New Hampshire* (1971) 403 U.S. 443.

¹⁶ It is also appropriate for the Justice Department to draw up guidelines regarding civil use by its employees to prevent analogous abuses. E.g., *compare United States v. General Elec. Co.* (E.D. Pa. 1962) 209 F. Supp. 197 (attorneys for Antitrust Div. allowed civil use) with *Capitol Indemnity Corp. v. First Minnesota Construction Co.* (D. Mass. 1975) 405 F. Supp. 929 (denied use by AUSA representing HUD in civil suit).

¹⁷ In this regard we recommend the thoughtful approach taken in *Robert Hawthorne, Inc. v. Director of Internal Revenue* (E.D. Pa. 1976) 406 F. Supp. 1098. Important areas which must be addressed by any set of guidelines include insuring that the experts understand the obligation of secrecy, creating an environment conveying the message that the agency is assisting the grand jury and not vice versa, and providing adequate control over and record of the access.

ments, however, are so basic to the preservation of values served by grand jury secrecy that they should be explicitly stated: (1) on appropriate request, the agency must identify the source of its information in a civil case that was preceded by a grand jury investigation in which its personnel were used to assist the prosecutor in presenting a case to the grand jury; and (2) upon a motion to suppress in the civil proceeding, the agency bears the burden of proving an independent source for the information.

By requiring identification we do not mean to saddle the agency with an onerous task, rather we intend only that, in the infrequent cases where there has been a grand jury inquiry assisted by its personnel, it must indicate whether or not the grand jury was the source of the information supporting the agency's position.¹² (Cf. 18 U.S.C. § 3504.) Such identification is necessary to remind the agency of its obligation to insure secrecy; the situation of agency access is analogous to that of the immunized grand jury witness. (See *Kastigar v. United States* (1972) 406 U.S. 441, 460.) Identification is but the first step in a schema guaranteeing that the individual "is not dependent for the preservation of his rights upon the integrity and good faith" of the agency personnel working on his case. (*Kastigar, supra*, at 460). The requirement removes most of the incentive for improper agency deflection of the grand jury inquiry by denying use of improperly acquired information.

The prosecution normally bears the burden of proving that evidence is untainted when taint is *prima facie* shown.¹³ This allocation of burden is particularly appropriate when civil use is made of grand jury material, because the private litigant has no means of practical access to the facts that would prove the link between the grand jury testimony and the evidence that the Government produces at the civil proceeding. The secrecy of the grand jury proceeding together with the Government's exclusive knowledge of the steps that it took in the investigation foreclose effective access to the private litigant. (See *Baker v. United States Steel Corp.*, *supra*, at 1081 (Lumbard, J., dissenting).) Additionally, because we are dealing with the evanescent area of privileged communications, it is important to avoid even the appearance of undermining the grand jury's secrecy.

In this case, both an adversary hearing and individual expert-by-expert findings of the necessity for assistance were lacking. The disclosure was available for civil use without a further showing of "particularized and compelling need" as required by the second sentence of Rule 6(e). Accordingly, the order is vacated, and the cause is remanded for proceedings consistent with the views herein expressed.

¹² The procedure and standards we envision are similar to those under 18 U.S.C. § 3504. See *United States v.* See (9th Cir. 1974) 505 F.2d 845; *United States v. Vielguth* (9th Cir. 1974) 502 F.2d 1957; *United States v. Alter* (9th Cir. 1973) 482 F.2d 1016; Comment, "Claiming Illegal Electronic Surveillance: An Examination of 18 U.S.C. § 3504(a)(1)," 11 Harv. Civ. Rts.—Civ. Lib. L. Rev. 632 (1976).

¹³ Where illegal activity by government agents has been shown that may have led to evidence proffered by the prosecution, the prosecutor has the burden of demonstrating that the evidence is untainted. See *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962), *aff'd after remand*, 319 F.2d 661 (2d Cir. 1963). In *United States v. Wade*, [388 U.S. 218, 240] (1967), the Supreme Court described the prosecutor's burden as one of making a 'clear and convincing' showing in this regard." 1 A. Amsterdam, B. Segal, & M. Miller, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 251 at 2-190 (1967) (emphasis added).

APPENDIX 2

[Supplemental information submitted by Jay Schulman:]

21 STUDIES OF FEDERAL AND STATE PROSPECTIVE JURORS' TENDENCY TO
EQUATE AN INDICTMENT WITH PROBABLE GUILT

Question. If the state goes to the trouble of bringing someone to trial he is probably guilty.

	Percent agreeing	Number interviewed
Federal jury pools:		
1970-71: Middle district of Pennsylvania.....	21	1,200
1973: Southern division of New Jersey.....	28	1,800
1973-74: Northern division of Florida.....	29	400
1974: St. Paul division of Minnesota.....	25	547
1975: Southern division of South Dakota.....	28	565
1975: Southern district of New York.....	27	1,657
1976: Middle district of California.....	26	650
1976: District of Maryland.....	29	397
State jury pools:		
1974: Erie County, N.Y.....	25	804
1975: Sparta, Wis.....	25	256
1975: Wake County, N.C.....	33	863
1975: Pittsburg County, Okla.....	28	351
1975: Santa Monica, Calif.....	30	565
1975: Berks County, Pa.....	33	800
1975: Delaware County, Pa.....	24	300
1975: Schuylkill County, Pa.....	29	400
1975: Lehigh County, Pa.....	23	300
1975: Bucks County, Pa.....	24	300
1976: Middlesex County, N.J.....	23	302
1976: Suffolk County, Mass.....	21	647
1976: Alameda County, Calif.....	13	628

Source: National jury project data files.

ALLOCATION OF PEREMPTORY CHALLENGES IN U.S. CAPITAL AND FELONY CASES, 1970-77

	Capital offenses			Felony offenses		
	Defense	Prosecution	Ratio	Defense	Prosecution	Ratio
1790.....	20	0	-----	State rules		
1865.....	20	5	4-1	10	2	5-1
1872.....	20	5	4-1	10	3	3.3-1
1911.....	20	20	1-1	10	5	2-1
1946.....	20	20	1-1	10	6	5-3
1977 ¹	(12)	(12)	1-1	(5)	(5)	1-1

¹ Proposed by U.S. Supreme Court.

Sources: Congressional Record; Blackstone Commentaries; Moore, Voir Dire Examination of Jurors: The English Practice 16 Georgetown Law Review, 1927-28.

APPENDIX 3

[Supplemental information submitted by David R. Freeman. Excerpt from Appellant's Brief, *United States v. Carter*, Docket No. 75-1273, 8th Circuit Court of Appeals.]

The District Court Erred in Denying Defendant's Motion for a Mistrial and Motion for Judgment of Acquittal or a New Trial Based on the Government's Improper Exercise of its Peremptory Challenges

Tracing the history of peremptory challenges in the criminal justice systems of the United States and England is difficult because in early English law peremptory challenges are interwoven with and akin to our challenges for cause. However, the concept of challenging or striking potential jurors is recorded as early as the year 104 B.C. in ancient Rome where it was enacted by statute that the accused and his accuser would each propose one hundred (100) "judices", with each having the right to reject fifty (50) from the list of the other resulting in

one hundred (100) remaining to try the alleged crime, Forsyth, *History of Trial by Jury* (2d ed. 1878) p. 145.

By the middle of the 13th century, jury challenges in England are referred to in legal treatises from that time, 2 Pollock and Maitland, *The History of English Law* (2d ed. 1898), p. 621, 649. However, it is important to remember that from its very inception the concept of jury challenges was looked upon as a protection for the accused rather than a right of the prosecutor, 4 W. Blackstone, *Commentaries*, p. 346 (1st ed. 1765), peremptory challenge was intended to be "a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous." In early England, as in the United States today, it was recognized beyond dispute, that the purpose of jury challenges was to insure to the accused a trial by a jury of his equals, selected from his community, as a protection against the Government's exercise of arbitrary power. As early as the reign of King Edward IV of England, a case is reported in which two criminal defendants sought to set aside their conviction because they were tried by justices of the King's Bench rather than a jury. The King granted their petition and thereby "affirmed the principle of the indefeasible right of the subject of this realm to be tried, as they have heretofore been accustomed, by a jury of their peers.", Forsyth, *History of Trial by Jury*, p. 363 (emphasis added).

In the United States any examination of the law applicable to peremptory challenges in criminal cases must begin with the trilogy of cases decided by the Supreme Court in 1880; *Strauder v. West Virginia*, 100 U.S. 303; *Virginia v. Rives*, 100 U.S. 313; and *Ex Parte Virginia*, 100 U.S. 339. The *Strauder* and *Rives* cases involved challenges to state jury selection for grand and petit juries by Negro defendants seeking removal from state to federal courts. *Ex Parte Virginia* involved a challenge of a statute making it a federal crime to exclude Negroes from state, grand and petit juries. All of these cases were decided under the Fourteenth Amendment to the United States Constitution Due Process and Equal Protection Clauses, which was passed and designed primarily for the protection of the Negro race after emancipation, *Strauder*, *supra*, 100 U.S. at 307. Even as early as 1880, the Supreme Court recognized that when the right to trial by jury in criminal cases, guaranteed by Article III of the United States Constitution, is infringed upon by improper jury selection, not only the accused suffers injury, but also the class of excluded citizens, by denying them the "privilege of participating equally . . . in the administration of justice," *Strauder*, *supra*, 100 U.S. at 308. The Court's finding of a denial of due process and equal protection in *Strauder* was based on the unfortunate, but undeniable, existence of prejudices among classes in all societies, including racial prejudice between Whites and Blacks which has continued in the United States to the present day;

"The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellow associates, persons having the same legal status in society as that which he holds. . . . It is well known that prejudices often exist against particular classes in the community, which sway the judgments of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."

Strauder, *supra*, 100 U.S., at 308-309. Challenges to the selection of juries, principally by Negro defendants, continued after *Strauder* and in 1935 in *Norris v. Alabama*, 294 U.S. 587, 589, the Supreme Court restated the principle that systematic exclusion of a class of persons from jury service is a deprivation of the defendant's right to an impartial jury in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and cited the following cases as standing for the same principle: *Neal v. Delaware*, 103 U.S. 370, 397; *Gibson v. Mississippi*, 162 U.S. 565; *Carter v. Texas*, 177 U.S. 442, 447; *Rogers v. Alabama*, 192 U.S. 226, 231; *Martin v. Texas*, 200 U.S. 316, 319. See also *Patterson v. Alabama*, 294 U.S. 600 (1935). In 1940 the Supreme Court again had occasion to restate its principle in a case brought by a Negro defendant challenging his indictment by a State Grand Jury from which Negroes were systematically excluded solely on account of their race, *Smith v. Texas*, 311 U.S. 128, 130;

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with out basic concepts of a democratic society and a representative government . . . the fact that the written

words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised."

All of the cases cited above dealing with jury selection had to do with the selection of a panel from various types of jury lists. In *Swain v. Alabama*, 380 U.S. 202 (1965) the same issue of systematic exclusion of a class of persons from a jury was brought before the Supreme Court, but this time the challenge involved the prosecutor's use of peremptory challenges to exclude Negroes from a jury in which the defendant was a Negro. The Court recognized that such systematic exclusion would amount to the perversion of the peremptory challenge, which was initially designed to protect a criminal defendant, *Swain v. Alabama*, *supra*, 380 U.S., at 224. However, the Court did not decide the case on this issue because it held, without citing any authority, that there was a presumption in any particular case that the prosecutor was exercising his peremptory challenges fairly and impartially, *Swain*, *supra* at 222, and that the petitioner had not made a sufficient showing to overcome this presumption. The petitioner's proof was found to be insufficient because, although he was able to show that no Negroes had ever served on a petit trial jury in Talladega County, he had not shown whether this was the result of peremptory challenges by the prosecutor or the defendant.

Since 1965, the *Swain* case has apparently been established as the landmark decision on the question of improper exercise of peremptory challenges by the prosecutor. And based on the *Swain* case several challenges to convictions based on systematic exclusion of Blacks from petit trial juries by the prosecutor's use of peremptory challenges have been denied by this circuit court because the defendant had not offered sufficient proof to overcome the presumption first enunciated in *Swain*. In *Maxwell v. Stephens*, 348 F. 2d 325 (8th Cir. 1965), a case which arose from the Eastern District of Arkansas, the defendant, a Negro, charged with the rape of a White woman challenged his conviction because of the nine (9) Blacks on the trial jury panel, three (3) were excused for cause by the Court and six (6) were removed by the prosecutor's use of peremptory challenges. The Court held that an all White jury was not an unconstitutional result citing *Swain v. Alabama*, *supra*. In *United States v. Pollard*, 483 F. 2d 929-930 (8th Cir. 1973), a case from the Eastern District of Missouri, all four (4) Black veniremen had been peremptorily challenged by the Government. The appeal was denied because the appellant had not offered any evidence of the "prosecutor's systematic exclusion of Blacks from petit juries over an extended period of time."

The Court again relied on *Swain's* finding of a presumption of proper conduct on the part of the prosecutor. In *Little v. United States*, 490 F. 2d 686 (8th Cir. 1974), from the Eastern District of Missouri, the prosecutor struck all Blacks from the jury panel. However, the appeal was again denied because no proof of systematic exclusion had been offered. These cases were followed in the most recent case, *United States v. Delay*, 500 F. 2d 1360, 1365 (8th Cir. 1974), from the Eastern District of Missouri, where the prosecutor excluded all Blacks from the jury in a case involving a White defendant. The Court held that a single incidence of exclusion of all Blacks from a jury is not grounds for reversal citing *Swain v. Alabama*, *supra*. In each of the above cases the Court held that to overcome the presumption that a prosecutor has exercised his peremptory challenges properly, a defendant must make a prima facie showing of discrimination by proving the prosecutors' systematic exclusion of Blacks from petit juries over an extended period of time, *United States v. Delay*, *supra* at 1366.

The quantum of proof necessary to make the prima facie showing contemplated by *Swain* has never been delineated or even discussed by this Court. However, it would appear that in balancing the right of the prosecutor to exercise his peremptory challenges against the right of the criminal defendant to a fair trial by an impartially selected jury, the right of the defendant to a fair trial should be more carefully guarded and that liberality should be used in measuring the defendant's quantum of proof of systematic exclusion. *United States v. Pearson*, 448 F. 2d 1207, 1217 (5th Cir. 1971) :

"We do not read *Swain* as meaning that the attack on the Government's use of its challenges must fail if the impermissible use is not exercised one hundred percent of the time (compare 380 U.S. 206, 85 S. Ct. 824, 13 L. Ed. 2d 759).

... it can reasonably be argued that the courts should be liberal in holding that defendants have established the claim of systematic exclusion *prima facie* if *Swain's* approach to the problem is to be workable. The burden of proof faced by defendants is most difficult."

Appellant submits that the presumption of prosecutorial fairness found in *Swain* is without basis in common law, case law or statute and that the burden should be placed on the prosecutor to prove proper exercise of his peremptory challenges rather than upon the defendant. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. Cal. L. Rev. 235, 286-287.

"The Supreme Court's view seems to suppose that a prosecutor trying a Negro removes Negro veniremen to get White ones, his objective is to remove possible prejudice in order to substitute probable impartiality, and that the natural effect of removing all Negroes by peremptory challenge is to produce a fair, albeit White, jury. To state the point is sufficient to refute it."

However, even under the *Swain* decision appellant submits that he has made a *prima facie* showing of systematic exclusion in the instant case. Although the District Court denied appellant's challenge on the basis that appellant's statistics showed that the prosecutor had left Blacks on the jury panel in slightly over fifty percent (50%) of the cases, these statistics can be looked at in different ways and different conclusions reached. We believe it is significant that in exercising its peremptory challenges in the fifteen (15) criminal jury trials in the Western District of Missouri during 1974, the prosecutors excluded eighty-three percent (83%) of the Black veniremen, who had been found qualified to serve as petit jurors and who had not been challenged for cause. Appellant submits that such a high percentage cannot be the result of coincidence and can only indicate a philosophy on the part of the U.S. Attorney's Office for the Western District of Missouri, whether conscious or sub-conscious, of trying to exclude as many Blacks as possible from criminal trial juries in which the defendant is Black. One need not conclude that this is a conscious effort on the part of the U.S. Attorney's Office to deny Black defendants a fair trial. It may be the result of habit, of failure to thoroughly voir dire the jury, or of other unknown factors at work. In any event, the effect is the same, that is, that if you are a Black venireman in the United States District Court for the Western District of Missouri, you stand little chance of serving on a petit jury in a case where the defendant is Black.

In the instant case, the trial transcript indicates that during the voir dire of the jury it was established the first Negro venireman, Mr. Haynes, had formerly been in the Military Police, was employed as a tool setter at Remington Arms Company and that his wife was employed at a medical clinic in Lexington, Missouri (T. 18, 19, 21). Mr. Trezvant, was employed at Milgram Food Store and his wife at Research Hospital (T. 25). Mr. Beverly had been employed by the Internal Revenue Service for twelve (12) years and his wife was not employed (T. 26, 27). It was learned that Mr. Kelly and her husband were both employed in Laundries (T. 28). Mr. Thomas had a cousin who was a deputy United States Marshal and he, himself, was employed at Sears Roebuck, with his wife employed as a pre-school teacher (T. 10, 33, 34). Based on this information alone, the prosecutor struck those five (5) Blacks from the jury by using his peremptory challenges. Only a defense attorney who has sat at the counsel table with a Black defendant, with the defendant's family seated in the back of the courtroom, can fully appreciate the impact on these people of seeing Negro veniremen, who appear to be normal law-abiding, hard-working citizens of their community, struck from the jury for no other apparent reason than their race.

It is not only the denial of a fair trial to a Black defendant that is involved in the systematic exclusion of Blacks from a petit jury, but also the injury to those Blacks who are excluded by being denied their right to participate in government and the criminal justice system and to society as a whole by being denied the perspective that those Black veniremen might bring to a jury's deliberations. It would be presumptuous to conclude that Black jurors would vote as a unit solely because they are of the same race or that they would vote to acquit a Black defendant simply because he is Black. This may or may not occur in individual cases. The important thing to consider is that if over eighty percent (80%) of the Negroes potentially available for jury service are being excluded by the Prosecutor's use of peremptory challenges, a certain perspective is missing from the jury's deliberations in those cases. Just as Mr. Justice Marshall, a

Negro, brings a different perspective to the Supreme Court based on his different experiences, so might Black jurors bring a different perspective or set of ideas to a jury. Based on their individual experiences they may perceive evidence differently from a White juror or may judge the credibility of a witness differently. The same problem exists with the exclusion of any class of individuals from jury service. See *Ballard v. United States*, 329 U.S. 187, 193-194 (1946) involving the exclusion of women from juries. Whenever the prosecutor excludes any member of a particular class from service on a grand or petit jury simply because of his membership in that class, any criminal conviction which results has been unconstitutionally obtained.

Recent cases have held that the convicted defendant need not even be a member of the excluded class, *Peters v. Kiff*, 407 U.S. 493 (1971). This is based primarily on the belief that the value of a jury trial lies in the jury constituting a cross section of the community—people who bring different backgrounds and experiences to their deliberations and, thereby, water down each others prejudices and enhance their collective ability to understand the evidence and to weigh the credibility of the witnesses. As Mr. Justice Marshall pointed out in *Peters v. Kiff*, *supra*, 407 U.S. at 502-504, we need not conclude that jurors of one race are all going to vote as a unit to recognize the danger of excluding one segment of our citizenry from the only way in which many laymen can participate in the administration of justice. Congress has obviously stated the position of the legislature on this issue in passing Section 1862, Title 28, United States Code:

"No citizen shall be excluded from services as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status." (as amended 3/27/68).

In addition to a criminal defendant's right to a jury fairly selected, there is the right or privilege of each United States citizen to serve as a juror, no matter what class he belongs to. Except for the right to vote this may be the only way in which he can participate in government. The value of jury service lies in the educational value for the layman in having first hand contact with the criminal justice system and with the lawyers and judges who work in that system day in and day out. Jury service has been recognized as tending to cause people to think in terms of fair play; to accept responsibility for their own acts; to recognize their duties toward society; to promote the thinking of the community and its problems rather than only oneself; to place the direction of society in the hands of the people and to operate as a political safety valve to prevent revolution or violent overthrow of government. Forsyth, *History of Trial by Jury*, p. 355-357. Perhaps just as important a trial by a fairly selected jury may even have a beneficial effect on the defendant himself and his family:

"Now the very essence of the jury trial is its principle of fairness. The right of being tried by his equals, that is, his fellow-citizens, taken indiscriminately from the mass, who feel neither malice or favor, but simply decide according to what in their conscience they believe to be the truth, gives every man a conviction that he will be dealt with impartially, and inspires him with the wish to mete out to others the same measure of equity that is dealt to himself." (emphasis added) *History of Trial by Jury supra* at 354.

If the result indicated by appellant's statistics for criminal trials in the Western District of Missouri during 1974 occurred because of a plan used to select the jury panel, there would be little question about its unconstitutionality. If the same result is achieved by different means (peremptory challenge) the selection is still unconstitutional and the peremptory challenge system is in need of change. The peremptory challenge is procedural, provided for by Rule 24(b) Fed. R. Crim. Proc. There is nothing in the constitution that requires a certain number of peremptory challenges, requires that peremptory challenges be exercised in any specific manner, or requires peremptory challenges at all. *Stilson v. United States*, 250 U.S. 583, 586. Although peremptory challenges were originally conceived for the protection of the accused, it would appear that in the Western District of Missouri a Black defendant would stand a better chance of being tried by a fairly selected jury if no peremptory challenges were permitted at all. Appellant is aware of the practical difficulties in revising the peremptory challenge system but the mere fact of the continuing appeals on this issue since *Swain v. Alabama*, should indicate that it is a continuing problem and in need of revision.

Prosecutors have been secure in the belief that the purpose of peremptory challenge was to strike veniremen arbitrarily to try to obtain a pro-prosecution

jury. It should be established that peremptory challenges must be exercised consistent with the accused's constitutional rights. As one possibility, appellant suggests that when a criminal defendant raises the issue of systematic exclusion of a class by peremptory challenges, it should be stated on the record the number of persons on the panel who are members of the excluded class, the number struck by the prosecutor and the reasons for those strikes. If the Court believed that the strikes were exercised solely based on the juror's membership in the excluded class, the peremptory challenge would be disallowed. As another alternative, it may be that the government's right to peremptory challenges should be eliminated altogether and their strikes confined to those for cause. This approach is not so revolutionary when it is considered that this was the rule in early England. 4 W. Blackstone, *Commentaries* (1st ed. 1765) p. 347:

This privilege, of peremptory challenge, though granted to the prisoner, is denied to the King by the statute 33 Edw. I. st. 4., which enacts, that the King shall challenge no jurors without assigning a cause certain, to be tried and approved by the Court.

APPENDIX 4

CORRESPONDENCE

OFFICE OF THE FEDERAL PUBLIC DEFENDER,
DISTRICT OF MARYLAND,
U.S. COURTHOUSE,
Baltimore, Md., February 17, 1977.

HON. JAMES R. MANN,
Subcommittee on Criminal Justice, House Judiciary Committee, House Office
Building, Washington, D.C.

DEAR CONGRESSMAN MANN: It is my understanding that hearings are about to held with regard to whether or not the number of peremptory challenges allowed in Rule 24 of the Federal Rules of Criminal Procedure should be lowered. I am firmly of the opinion that limiting further the number of peremptory challenges will not result in any saving of time or money to the United States and can only deprive an accused of his right to a fair trial.

If you feel it would be of any assistance to your Committee, I would be willing to testify at a mutually convenient time.

Sincerely,

CHARLES G. BERNSTEIN,
Federal Public Defender.

LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT,
FEDERAL DEFENDER OFFICE,
Detroit, Mich., February 25, 1977.

Re Hearings on proposed changes in Federal Rules of Criminal Procedure.

THE HOUSE SUBCOMMITTEE ON CRIMINAL JUSTICE,
Sam Rayburn Office Building,
Washington, D.C.

(Attention of Mr. Thomas Hutchinson.)

DEAR SIR: We are writing with regard to the upcoming hearings on the proposed changes in the Federal Rules of Criminal Procedure. Specifically, we are displeased with Rule 24(b) which works to reduce the number of peremptory challenges, and do not favor same. Since our experience here indicates that the majority of the judges do not allow defense counsel to personally voir dire the jury; that there is under-representation of minorities and young people in the jury pool; that many of the Assistant U.S. Attorneys tend to exclude these under-represented groups of people from juries; and that the average time involved in impanelling a jury is not more than 2 hours, we feel that proposed Rule 24(b) is ill-advised and inherently unfair to defendants.

Sincerely,

JAMES E. ROBERTS, Chief Federal Defender.

**COMMUNITY DEFENDER ORGANIZATION
OF THE DISTRICT OF MINNESOTA, INC.,
Minneapolis, Minn., February 25, 1977.**

Mr. THOMAS HUTCHISON,
Chief Counsel, Subcommittee on Criminal Justice, Sam Rayburn Office Building, Washington, D.C.

DEAR MR. HUTCHISON: By way of introduction, I am the Federal Community Defender for the District of Minnesota. I understand the Subcommittee on Criminal Justice of the House Judiciary Committee is holding hearings on proposed changes in Rule 24, Federal Rules of Criminal Procedure. I understand that proposals are before the Committee to reduce peremptory challenges available to defendants in felony cases.

I believe any reduction in peremptory challenges would seriously impair the ability of defendants to obtain fair trials. The slight advantage accorded defendants in the number of peremptory challenges is a valuable right cherished by all defense lawyers. For indigent defendants, that right is doubly valuable.

In the District of Minnesota, the jury selection process, from my experience, represents a very small percentage of the total jury trial process. The Federal District judges conduct substantially all of the voir dire. Therefore, any time saving by reducing peremptory challenges will be insignificant.

While I feel our jury panels in the District of Minnesota are representative of minorities, the minority populations in our District are comparatively small. Therefore, a minority member accused of a crime prizes peremptory challenges. I feel the Assistant United States Attorneys involved in litigation in this District are fair minded. Nonetheless, if only one or two members of a minority are available for jury selection, probabilities are increased of their exclusion if the defendant is also a minority member.

I sincerely hope that the Subcommittee will resist any temptation to save time at the risk of denying traditional rights.

Very truly yours,

THOMAS M. KELLY, *Community Defender.*

ASSOCIATION OF DEFENSE LAWYERS,
Chicago, Ill., February 28, 1977.

HON. JAMES R. MANN,
*Chairman, Committee on the Judiciary,
Washington, D.C.*

DEAR MR. MANN: I am the President of the Illinois Association of Criminal Defense Lawyers, an organization of some three to four hundred attorneys specializing in the defense of criminal cases. In such capacity, I recently conducted a poll of our membership concerning the proposed reduction of peremptory challenges available to defendants pursuant to Rule 24 of the Federal Rules of Criminal Procedure.

It was the overwhelming opinion of the responding attorneys that the time to be saved by reducing the challenges was negligible. For example, on the average, the total time involved in jury selection in the Northern District of Illinois is only one and one-half hours. Reducing challenges in this situation would save only a few minutes.

Balanced against this is the importance of challenges in the selecting of a fair and impartial jury. As we are all aware, those persons harboring deep racial, ethnic, class or other prejudices are not often inclined to publicly admit them during voir dire examination. It is the function of the competent and experienced trial lawyer to perceive these prejudices, though not admitted by the potential juror, and to use a peremptory challenge to eliminate that person so that the entire proceeding will not become polluted by that prejudice.

It is, therefore, the position of the Illinois Association of Criminal Defense Lawyers that any reduction in the number of challenges peremptorily available to the defendant in a criminal case will be serious abrogation of the right to a fair trial and will in no significant manner speed the administration of criminal justice.

Very truly yours,

THOMAS P. DURKIN, *President.*

FEDERAL PUBLIC DEFENDER,
DISTRICT OF KANSAS,
Wichita, Kans., February 28, 1977.

HOUSE SUBCOMMITTEE ON CRIMINAL JUSTICE,
Sam Rayburn Office Building,
Washington, D.C.
(Attention of Thomas Hutchison.)

GENTLEMEN: A poll has been taken of trial counsel in the Office of Federal Public Defender for the District of Kansas. We are unanimous in our opposition to the proposed change of Rule 24. We feel that the amendment to the Rule would have an erosionary effect upon our federal jury system.

We, of course, are aware that there has been a sharp increase in crime in the past decade and that there is a concerted effort on everyone's part to remedy this problem. However, we sincerely feel that the current jury system should not be disturbed.

The average time expended in selecting a jury within our district is one to two hours.

We feel that the time and expense involved in selection of a jury should not be considered as criteria in determining whether or not the number of peremptory challenges should be reduced. The only criteria to be considered is a system that will afford a citizen of this country a fair trial.

Very truly yours,

LEONARD D. MUNKER,
Federal Public Defender.

CHARLES D. ANDERSON,
Assistant Federal Public Defender.

FEDERAL DEFENDER PROGRAM,
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Chicago, Ill., March 2, 1977.

THOMAS HUTCHISON, Esq.,
Chief Legal Counsel, House Subcommittee on Criminal Justice, Sam Rayburn
Office Building, Washington, D.C.

DEAR MR. HUTCHINSON: I take this opportunity to write in opposition to the proposed change in Rule 24 of the Federal Rules of Criminal Procedure, a change I voted against as a member of the Criminal Rules Committee. I offer the following brief comments in support of my opposition to attempting to reduce the number of defense peremptory challenges and to equalize the number of defense and prosecution peremptory challenges.

I respectfully suggest, based upon my experiences as a trial lawyer in the federal courts and the experiences of my staff attorneys, that reducing the number of peremptory challenges will have little or no effect in expediting trials. In some cases all of the peremptory challenges are not used. More importantly, time employed in jury selection in the federal courts is certainly not excessive. For that matter it takes us on the average a little more than an hour to select a jury in most federal court cases. In sum, the reduction of a few peremptory challenges will have an insignificant—if any—time saving effect.

On the other hand, reducing and equalizing the number of peremptory challenges may well prejudice defendants by eliminating an important safeguard to their right to a trial by an impartial jury of their peers. The minimal savings of time hardly justifies a potential deprivation of a constitutional right.

I mention still another concern, one which caused me to informally poll my staff attorneys, all of whom are engaged in the defense of legally indigent clients in the Northern District of Illinois. It is their belief and feeling, and though obviously we have no statistics to elevate this fact, that blacks, Latinos and young people (between the ages of 18 and 21) are definitely underrepresented on the jury rolls. Conversely, many of our defendants are young and either black or Latino. Further, my staff attorneys expressed the belief that this problem is exacerbated where, as is usually the circumstance, Assistant U.S. Attorneys preemptorily challenge blacks, Latinos and young people.

Respectfully submitted,

TERENCE F. MACCARTHY.

FEDERAL PUBLIC DEFENDER,
CENTRAL DISTRICT OF CALIFORNIA,
U.S. COURT HOUSE,
Los Angeles, Calif., March 3, 1977.

Hon. JAMES R. MANN,
Chairman, Subcommittee on Criminal Justice, House Judiciary Committee,
House Office Building, Washington, D.C.

DEAR CONGRESSMAN MANN: I understand that the subcommittee has been conducting hearings on the proposed amendments to the Federal Rules of Criminal Procedure. Based on our experience in the Central District of California, one of the largest federal trial courts in the nation, I am particularly concerned about the proposed reduction in the number of peremptory challenges. I would strongly urge the Congress to reject this amendment.

Trial judges in the federal system are undoubtedly under a great deal of pressure brought on, in part, by large caseloads, both civil and criminal. As an officer of the court I share the concern of the judges and would indeed support certain reform measures designed to relieve those pressures and enhance the quality of justice. Judicial economy and efficiency, however, are not an end in themselves, and to the extent the pending proposal is motivated largely by a desire to expedite and speed up the court process, the price in terms of fundamental fairness and due process is much too high. The entry point into a criminal jury trial, selection of those who will judge the accused, is one of the most critical points in the entire process, and perhaps the one at which the defendant has the most direct impact in ensuring a fair trial.

SIGNIFICANCE OF THE PEREMPTORY CHALLENGE

One cannot meaningfully discuss the significance of the peremptory challenge without first considering its precursor—*voir dire*. To rectify the obvious, if a defendant and his counsel have no information whatsoever about a proposed juror, it is impossible to frame a challenge for cause. As *voir dire* becomes more expansive; however, the challenge for cause takes on more meaning. Indeed, if *voir dire* is extensive and probes the background, biases and prejudices of a juror, the challenge for cause may become so effective as to diminish the need for peremptory challenges. In considering the proposed legislation then, the committee must recognize this interrelationship between *voir dire* and peremptory challenges within the context of practical experience in the federal courts.

Existing Rule 24(a) provides that "the court may permit the defendant or his attorney . . ." to conduct *voir dire* in addition to submitting written questions. Any experienced criminal practitioner in the Central District of California will tell you, however, that individual *voir dire* examination by counsel is virtually unheard of. In Los Angeles federal courts the practice is a lost art. Save for the headline case which comes but once every few years, to my knowledge only one of the sixteen judges in this district allows *voir dire* by counsel with any frequency, and even in those instances the questioning is closely circumscribed.

Judges will ask most questions submitted in writing, but the follow-through is not always as counsel would pursue it. Open-ended questions which are most likely to expose juror prejudice are almost never asked. The result is predictable. Unable to personally probe and question jurors themselves, and ill-informed by what many defense counsel perceive as an inadequate examination by the court, a defense attorney must fall back on peremptory challenges to ensure a jury of his client's peers. Instead of using the peremptory challenge for jurors who may offend for some totally subjective reason, the primary function of such a challenge, the precious few peremptories are used to remove jurors who, with a more thorough *voir dire*, might well have been removed with a challenge for cause.

SAVINGS OF TIME AND MONEY

The report of the Committee on the Operation of the Jury System concludes that "a reduction of peremptory challenges would accelerate the *voir dire* procedure and facilitate savings in juror costs through the use of smaller jury panels". Based on experience in the Federal Public Defender's Office in Los Angeles, the proposed amendment would most likely result in very little savings of time. It is our practice for the court to address an entire jury panel with general questions. The initial twelve are then seated and each is questioned individually by the Court about his or her residence, employment, prior jury experi-

ence and certain other standard questions. As new jurors are seated after challenges, the additional questioning is usually quite brief, and takes but a few additional minutes. Figuring conservatively that each new peremptory may result in an additional five minutes of time, the difference between five and ten peremptory challenges is but 25 minutes per trial. This also assumes, of course, that every peremptory will be exercised in every case, a result which practice does not bear out.

In fiscal 1976, this office tried 42 jury trials to judgment. (Under our local Criminal Justice Act plan, 75 percent of the indigent cases are handled by the Federal Public Defender and 25 percent by a private panel.) I think it is safe to say that the Public Defender and the Panel try the majority of the criminal jury trials in this district. Even assuming that in each case all ten peremptories were used, the additional time in *voir dire* of 25 minutes per case is less than 18 hours for the entire year. (The total for the entire district, of course, is proportionately higher taking into consideration the Panel and private counsel.) These figures are only approximate, but in my opinion constitute a reasonable estimate. As far as the savings resulting from smaller jury panels is concerned, I expect that is an undeniable fact. But the extent of savings would be small—six jurors per panel on the average. Considering the relatively low number of criminal jury trials even for a district of this size, the saving is minimal compared to the contraction of defendant's fundamental right to a fair trial.

ADDITIONAL PEREMPTORIES FOR GOOD CAUSE

It may be argued by proponents of the new rule that "for good cause shown, the court may grant such additional challenges as it, in its discretion, believes necessary and proper." Rule 24(b)(2)(A). Practical experience with the discretionary power of the court to allow counsel individual *voir dire*, as noted above, belies any expectation that such discretion would be exercised in favor of the defense save for the exceptional case. Moreover, under present practice, it is rare that a defendant is granted more than the peremptory challenges allotted by the current rule. Considering this precedent, it would seem unrealistic to expect that proposed Rule 24(a)(2)(A) will have any marked effect in softening the impact of the proposed reduction in the number of challenges.

Speaking for this office, and for no other members or elements of the justice system in the Central District, I would urge the committee to retain Rule 24 as it now stands and to reject the proposed amendments. If I may be of any further assistance, I would be happy to respond further.

Respectfully,

JAMES R. DUNN, *Federal Public Defender.*

MOTOR VEHICLE MANUFACTURERS ASSOCIATION
OF THE UNITED STATES,
Detroit, Mich., March 15, 1977.

Re Proposed amendments to the Federal rules of criminal procedure.

HON. JAMES R. MANN,
*Chairman, Subcommittee on Criminal Justice, U. S. House of Representatives,
Washington, D.C.*

DEAR MR. MANN: The Motor Vehicle Manufacturers Association of the United States, Inc. (MVMA) wishes to express its opposition to the amendment proposed to Rule 6(e), Secrecy of Proceedings and Disclosure, of the Federal Rules of Criminal Procedure, now before the Subcommittee on Criminal Justice.

This Association supports and endorses the comments on the proposed amendment submitted to the Subcommittee by the National Association of Manufacturers on February 23, 1977.

With the N.A.M., we urge that the confidentiality of grand jury proceedings be preserved. At least, a judicial determination of the need for disclosure should be expressly included in any amendment to Rule 6(e).

MVMA is a trade association whose membership includes most of the motor vehicle manufacturers in the United States. A list of our members is attached.

We appreciate the opportunity to express our views on this subject to the committee.

Sincerely,

THOMAS H. HANNA.

**MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC.,
DETROIT, MICH.**

MEMBER COMPANIES

American Motors Corp., 27777 Franklin Rd., Southfield, Mich.
 Checker Motors Corp., 2016 N. Pitcher St., Kalamazoo, Mich.
 Chrysler Corp., P.O. Box 1919, Detroit, Mich.
 Ford Motor Co., The American Rd., Dearborn, Mich.
 General Motors Corp., General Motors Building, Detroit, Mich.
 International Harvester Co., 401 North Michigan Ave., Chicago, Ill.
 PACCAR Inc., Business Center Building, P.O. Box 1518, Bellevue, Wash.
 Walter Motor Truck Co., Voorheesville, N.Y.
 Warner & Swasey Co., Badger Division, Airport Rd., Winona, Minn.
 White Motor Corp., 35129 Curtis Blvd., Eastlake, Ohio.

**OFFICE OF THE FEDERAL PUBLIC DEFENDER,
Denver, Colo., March 18, 1977.**

Re Proposed changes to rule 24 of the Federal rules of criminal procedure.

Hon. JAMES R. MANN,
*Subcommittee on Criminal Justice, House Judiciary Committee,
 Washington, D.C.*

DEAR MR. MANN: Having served in the Federal Criminal Justice System in excess of five years, both as an Assistant U.S. Attorney and more recently, as Federal Public Defender for the District of Colorado, I must take this opportunity to register my deep concern over the prospective changes to Rule 24 of the Federal Rules of Criminal Procedure.

I am particularly distressed to learn that the Subcommittee on Criminal Justice is considering reducing the number of peremptory challenges to 12 for each side in capital cases, 5 for each side in felony cases, and 2 for each side in misdemeanor cases. The Advisory Committee Note indicates that there is a concern for expediting the jury selection process in federal court, as well as, reducing what is considered by the Committee on the Operation Jury System to be a large number of peremptory challenges in criminal cases.

As you are aware, the empaneling of a jury, at the present time, is largely controlled by the federal district judge with any suggested questions by counsel for the respective parties to be tendered to the Court in advance and in writing. Our experience in the District of Colorado teaches us that a federal district judge who has control of his courtroom can assure the selection of a jury in a federal felony case within an average of 45 minutes. This substantially reduces what was previously, in my experience, a two to three day process in the state system.

It would be nice to believe that the guarantee of 5 peremptory challenges for each side would assure a fair and impartial jury in every case, and it is easy to justify a reduction of the challenges presently provided by the assurance that a federal judge still has the discretion to enlarge the number when circumstances warrant it. However, with the strict standards imposed by the federal judges as to what constitutes a challenge for cause, as well as our seeming reduction in the number of minorities showing up on our panels in the District of Colorado, a further reduction and equalization of the peremptory challenges is going to substantially lessen the assurance to a defendant that he is going to receive a fair trial.

As Federal Public Defenders, and more importantly, as officers of the Court we are concerned with two things. All criminal practitioners should be sensitive, not only to the assurance of justice in fact, but to the *appearance* of justice to a defendant brought before the Court. When a prospective juror, on the one hand, answers a judge that he has read about the case or has some preconceived notion as to its merits, but, on the other, assures a judge that he or she can serve fairly and impartially, and is not removed for cause, additional peremptory challenges are warranted. Further, it is illusory to believe that prospective jurors candidly answer questions with regard to bias and prejudice. Therefore, the only tool a defense attorney has for the removal of a juror evidencing bias or prejudice less than that constituting removal for cause is the present four additional peremptory challenges.

You are aware, I am sure, of the strict standards adopted to justify a change of venue in a high publicity or sensational case. It goes without saying that our citizenry reacts passionately when a heinous or aggravated case is presented to them. This type of case inures to the benefit of the government in selecting a jury. By merely stating that a federal judge has the discretion to increase peremptory challenges in such a case does not remedy the problem. Federal judges presently have such discretion under 24(b), but as a general rule, simply do not exercise it in a joint-defendant case due to their concern for expediency.

As a former prosecutor, I can assure you the expeditious jury selection process in the federal courts with a federal judge's "soft" probing into the partiality or impartiality of a jury certainly worked to my benefit. With the extremely limited participation we are presently allowed in the *voir dire* process, please don't further reduce our ability to assure not only justice in fact, but the appearance of justice to our clients.

Being employees of the Federal Government inevitably arouses certain suspicions by our clients in the first instance. The selection of the trier of fact is the most vital element in assuring impartiality in the decision-making process. A reduction of the present number of challenges will further erode our ability to assure a fair and impartial jury.

Thank you for your consideration.

Very truly yours,

DANIEL J. SEARS,
Federal Public Defender.

CALIFORNIA PUBLIC DEFENDERS ASSOCIATION,
Oakland, Calif., March 23, 1977.

Hon. JAMES R. MANN,
Subcommittee of Criminal Justice, Judiciary Committee, House of Representatives, Washington, D.C.

DEAR MR. MANN: This is to inform you that, at its last meeting, the Board of Directors of the California Public Defenders Association passed a resolution opposing any reduction in the number of peremptory challenges available to defense attorneys in federal criminal cases.

Sincerely,

MANUEL E. NESTLE,
Executive Director.

APPENDIX 5

Union Calendar No. 96

95TH CONGRESS
1ST SESSION**H. R. 5864**

[Report No. 95-195]

IN THE HOUSE OF REPRESENTATIVES

MARCH 31, 1977

Mr. MANN (for himself, Ms. HOLTZMAN, Mr. HALL, Mr. GUDGER, Mr. EVANS of Georgia, Mr. WIGGINS, and Mr. HYDE) introduced the following bill; which was referred to the Committee on the Judiciary

APRIL 11, 1977

Committed to the Committee of the Whole House on the State of the Union
and ordered to be printed

A BILL

To approve with modifications certain proposed amendments to the Federal Rules of Criminal Procedure, to disapprove other such proposed amendments, and for other related purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That notwithstanding the first section of the Act entitled
4 "An Act to delay the effective date of certain proposed
5 amendments to the Federal Rules of Criminal Procedure
6 and certain other rules promulgated by the United States
7 Supreme Court" (Public Law 94-349, approved July 8,
8 1976) the amendments to rules 6(e), 23, 24, 40.1, and
9 41(c)(2) of the Rules of Criminal Procedure for the United

1 States district courts which are embraced by the order en-
2 tered by the United States Supreme Court on April 26,
3 1976, shall take effect only as provided in this Act.

4 SEC. 2. (a) The amendment proposed by the Supreme
5 Court to rule 6 (e) of such Rules of Criminal Procedure is
6 approved in a modified form as follows: Such rule 6 (e) is
7 amended by striking out "The court may direct that an in-
8 dictment shall be kept secret" and all that follows through
9 "the clerk shall seal" and inserting in lieu thereof the follow-
10 ing: "The federal magistrate to whom an indictment is
11 returned may direct that it shall be kept secret until the
12 defendant is in custody or has been released pending trial.
13 Thereupon the clerk shall seal".

14 (b) (1) The amendment proposed by the Supreme
15 Court to rule 23 (b) of such Rules of Criminal Procedure is
16 approved.

17 (2) The amendment proposed by the Supreme Court to
18 rule 23 (c) of such Rules of Criminal Procedure is approved
19 in a modified form as follows: Rule 23 (c) of such Rules of
20 Criminal Procedure is amended by striking out the first sen-
21 tence and inserting in lieu thereof the following: "In a case
22 tried without a jury the court shall make a general finding
23 and in addition if the defendant is found guilty shall make a
24 special finding as to the facts, unless such special finding is

3

1 waived by the defendant. Such general findings and special
2 findings may be made orally.”.

3 (e) The amendment proposed by the Supreme Court
4 to rule 24 of such Rules of Criminal Procedure is disap-
5 proved and shall not take effect.

6 (d) The amendment proposed by the Supreme Court to
7 such Rules of Criminal Procedure, adding a new rule desig-
8 nated as rule 40.1, is disapproved and shall not take effect.

9 (e) The amendment proposed by the Supreme Court to
10 rule 41 (e) of such Rules of Criminal Procedure is disap-
11 proved and shall not take effect.

12 SEC. 3. (a) The first section of this Act shall take ef-
13 fect on the date of the enactment of this Act.

14 (b) Section 2 of this Act shall take effect October 1.
15 1977.

APPENDIX 6

95TH CONGRESS 1st Session	}	HOUSE OF REPRESENTATIVES	}	REPORT No. 95-195
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AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL
PROCEDURE

APRIL 11, 1977.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. MANN, from the Committee on the Judiciary,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 5864]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5864) to approve with modifications certain proposed amendments to the Federal Rules of Criminal Procedure, to disapprove other such proposed amendments, and for other related purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of the legislation is to approve with modifications certain amendments to the Federal Rules of Criminal Procedure that were proposed by the Supreme Court and to disapprove other such amendments.

BACKGROUND

The Federal Rules of Criminal Procedure prescribe the procedures to be followed in criminal proceedings in federal courts. They are usually amended by a process established by statutes known as the "Rules Enabling Acts." These Acts empower the Supreme Court to propose new rules of "pleading, practice, and procedure" and amendments to existing rules. The Acts require that all such rules and amendments must be reported to Congress after the start of a regular

session but no later than May 1. A proposed new rule or amendment takes effect 90 days after it is reported to Congress.¹

On April 26, 1976, the Supreme Court, pursuant to the Enabling Acts, promulgated several amendments to the Federal Rules of Criminal Procedure.² The Court, at the same time, also promulgated sets of procedural rules to govern proceedings under 28 U.S.C. sections 2254 and 2255 (sometimes referred to as habeas corpus proceedings) and sets of procedural rules to govern bankruptcy proceedings.

All of those amendments and rules were to have taken effect on August 1, 1976. However, Congress enacted legislation that delayed the effective date of some of the proposed amendments and rules.³ The effective date of all but two of the proposed amendments to the Federal Rules of Criminal Procedure was delayed until August 1, 1977, and the effective date of the proposed habeas corpus rules was delayed until 30 days after the 94th Congress adjourned sine die.⁴

The proposed amendments to the Federal Rules of Criminal Procedure, whose effective date was delayed made changes in four existing rules: Rule 6, dealing with grand juries; Rule 23, dealing with trials by juries of less than 12 persons and trials where juries have been waived; Rule 24, dealing with peremptory challenges to jurors; and Rule 41, dealing with procedures for obtaining search warrants. In addition, those proposed amendments added a new rule (40.1) dealing with removal of criminal cases from State to Federal court.

All of those proposed amendments are presently pending before Congress. If Congress does not act on them by August 1, 1977, they will take effect in the form proposed by the Supreme Court, without any congressional input. Thus, if the Congress is to have an effective role in shaping the policy of the proposed amendments, it must enact legislation by August 1, 1977.

With that time deadline in mind, the committee's Subcommittee on Criminal Justice began working on the proposed amendments early in the session. It held 3 days of hearings and took testimony and received statements from a wide range of persons and organizations. It heard from the Judicial Conference, the Justice Department, a Member of Congress, a Federal district judge, several Federal public defenders, and several private practitioners and law professors. It also heard from representatives of several groups and organizations, including the American Bar Association, the American Civil Liberties Union, the National Association of Manufacturers, the National Association

¹ The Supreme Court itself does not actually draft the proposed rule or amendment; that work is done by a committee of the Judicial Conference of the United States. In the case of the Federal Rules of Criminal Procedure, that committee is the Advisory Committee on Criminal Rules. The Advisory Committee's draft of a proposed rule or amendment is reviewed by the Standing Committee on Rules of Practice and Procedure, which must give its approval to the draft. Any draft that it approves is forwarded to the Judicial Conference of the United States. If the Judicial Conference approves the draft, it forwards the proposed rule or amendment to the Supreme Court. The Judicial Conference's role in the rulemaking process is defined by 28 U.S.C. sec. 331.

For background information on how the Judicial Conference committees operate, see statement of Judge Roszel C. Thomsen, in *Hearings on Proposed Amendments to Federal Rules of Criminal Procedure* before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 2d sess., serial 61, at 2-5 (1974); statement of Judge J. Edward Lumbard, *id.* at 8-11. See also statement of Prof. Howard Leisnick, *id.* at 203; J. B. Weinstein, "Reform of Federal Court Rulemaking Procedures," 76 *Columbia Law Review* 905 (1976).

² The particular Enabling Acts involved were 18 U.S.C. secs. 3771 and 3772.

³ Public Law 94-349.

⁴ Congress acted upon the habeas corpus rules before the 94th Congress adjourned. Public Law 94-426 approved most of those rules as proposed and approved the rest of them with modifications.

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of Criminal Defense Lawyers, the Motor Vehicle Manufacturers Association, the National Jury Project, the Legal Aid Society of New York City, the National Conference of Black Lawyers, the New York Criminal Bar Association, and the Association of Defense Lawyers.

H.R. 5864 is the product of the information and testimony gathered during this study of the proposed amendments.

SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 of H.R. 5864 provides that the proposed amendments to Rules 6(e), 23, 24 and 41(c)(2) and proposed new Rule 40.1 of the Federal Rules of Criminal Procedure, whose effective date was postponed to August 1, 1977, by Public Law 94-349, shall take effect only as provided by the legislation.

Section 2

Section 2 of H.R. 5864 takes action on each of the proposed amendments. It approves some of them, either as proposed or with modifications, and it disapproves the others.

*Rule 6. The Grand Jury**1. Proposed Amendment*

Rule 6(e) deals with the secrecy of grand jury proceedings. The proposed amendment makes both substantive and technical changes in the rule.

Substantive change.—Rule 6(e) currently provides that “disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties.” Rule 54(c) defines attorneys for the government to include “the Attorney General, an authorized assistant of the Attorney General, a United States attorney, an authorized assistant of a United States attorney, and when applicable to cases arising under the laws of Guam, means the Attorney General of Guam”

The substantive change to Rule 6(e) would add the following new language:

For purposes of this subdivision, “attorneys for the government” includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.

The Advisory Committee note asserts that the proposed amendment restates the trend in the case law. “Although case law is limited, the trend seems to be in the direction of allowing disclosure to Government personnel who assist attorneys for the Government in situations where their expertise is required.”⁵ The note states that the proposed amendment is intended “to facilitate an increasing need, on the part

⁵ Advisory Committee note to proposed amendment to Rule 6, in communication from the Chief Justice of the United States, H. Doc. No. 94-464, at 9.

of Government attorneys to make use of outside expertise in complex litigation.”⁶ The example usually cited is the need to utilize the expertise of IRS and SEC agents and accountants in complex tax or stock fraud cases.

Technical changes.—The proposed amendment to Rule 6(e) makes a series of changes in the rule designed to make its provisions consistent with other provisions in the Rules and in the Bail Reform Act of 1966. For example, the rule presently speaks of a “court” keeping an indictment secret until the defendant is in custody. The proposed amendment would change “court” to “federal magistrate” in order to make Rule 6(e) consistent with Rule 6(f).⁷

B. Legislative Action

Section 2(a) of H.R. 5864 approves with modifications the proposed amendment to Rule 6(e). It approves the technical changes as they have been proposed and disapproves the substantive change.

The substantive change to Rule 6(e) has been much criticized. There was concern that it would permit too broad an exception to the rule of keeping grand jury proceedings secret. It was feared that the proposed change would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case. This would enable those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them.⁸

The Advisory Committee’s claim that the proposed substantive change is consistent with the trend in the case law is open to question. In *J. R. Simplot Co. v. U.S. District Court for the District of Idaho*, Nos. 76-1893, 76-1995, slip opinion at 7-8 (9th Cir., filed November 12, 1976), the court observed

Two main points stand out: First, agency assistance to the prosecutor or the grand jury should never be allowed except upon an adversary hearing resulting in a finding that assistance is necessary. Second, the court’s duty to safeguard the independence of the grand jury lives beyond that hearing and requires close supervision of the agency’s civil use of the information acquired from grand jury materials.

The Subcommittee on Criminal Justice conducted a brief survey of several U.S. attorneys’ offices with respect to their current policies about disclosure of grand jury information. That survey revealed that there is no consistent practice concerning what things can be disclosed, to whom they can be disclosed, and under what circumstances they can be disclosed. For example, the persons contacted were asked whether they would disclose to a Federal investigative agency grand jury information about criminal conduct unrelated to the matter before the grand jury. There was a wide range of answers. Some persons said they would disclose the information only if the investigative

⁶ *Id.* at 8.

⁷ The rule as amended would not preclude a judge from receiving an indictment and keeping it secret. Rule 54(e) defines “federal magistrate” to include U.S. judges as well as U.S. magistrates.

⁸ See statement of Phyllis Skloot Bamberger on behalf of the Legal Aid Society of New York; statement of Representative Steven D. Symms; statement of the National Association of Manufacturers. See also note, “Administrative Agency Access to Grand Jury Materials,” 75 Columbia Law Review 162, 175-84 (1975).

agency were a part of the Justice Department (such as the FBI). One person who responded this way also said that he would not disclose the information if the matter involved was "highly sensitive." Some persons said they would disclose such information to any investigative agency, but only if that agency had assisted in the investigation of the matter before the grand jury that developed the information. One person suggested that he would disclose the information but would not indicate its source to the investigative agency.

In short, the present state of the law and practice under Rule 6(e) is unclear. Present Rule 6(e) does not clearly spell out when, under what circumstances, and to whom grand jury information can be disclosed. It ought to be rewritten entirely.⁹

The questions concerning grand jury secrecy presented by the proposed substantive change are basic to the function and operation of the grand jury. The committee's Subcommittee on Immigration, Citizenship, and International Law has begun work on comprehensive grand jury reform legislation that takes up basic questions about the function and operation of the grand jury.¹⁰ That subcommittee has already held one hearing on the legislation and additional hearings are planned. The issues surrounding Rule 6(e) and the proposed substantive change will be taken up by that subcommittee during its work on the grand jury reform legislation.

Rule 23. Trial by Jury or by the Court

A. Proposed Amendment

The proposed amendment makes changes in subdivisions (b) and (c) of Rule 23. Rule 23(b) deals with cases tried by juries of less than 12 persons, and Rule 23(c) deals with cases tried without a jury.

Rule 23(b).—Rule 23(b) presently provides that the parties, with the court's approval, may stipulate in writing at any time before the verdict is returned that the jury shall consist of fewer than 12 people. The proposed amendment would add that the parties, with the court's approval, may also stipulate that

a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

The Advisory Committee note states that the proposed amendment is intended to clarify "that the parties, with the approval of the court, may enter into an agreement to have the case decided by less than 12 jurors if 1 or more jurors are unable or disqualified to continue."¹¹ The

⁹ There are indications that the proposed substantive change will not clarify the present situation and may even lead to further uncertainty. The Judicial Conference and the Justice Department assert that the proposed rule would give an attorney for the Government sole and unfettered discretion to determine when and to whom to disclose grand jury information for the purpose of obtaining assistance in the performance of his duties as a Government attorney. Two courts seem to disagree with that assertion.

The requirement for a showing of need would remain under the pending amendments to Rule 6(e) which expand "attorneys for the government" to include "such other Government personnel as are necessary to assist the attorneys for the government in the performance of their duties." 44 U.S.L.W. 4549 (emphasis added). Because of the United States Attorney's involvement in the prosecution of the case, he or she cannot be entrusted with passing on the necessity of assistance. Cf. *Coolidge v. New Hampshire* (1971) 403 U.S. 443.

¹⁰ *J. R. Simplot Co. v. U.S. District Court for the District of Idaho*, Nos. 76-1893, 76-1905, slip opinion at 8 n.15 (9th Cir., filed November 12, 1976). See also *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1126 (E.D.Pa. 1976).

¹¹ See H.R. 94 and related bills.

¹² Advisory Committee note to proposed amendment to Rule 23, II. Doc. No. 94-464, at 11.

note suggests that present Rule 23(b) may authorize this result, "but there has been some doubt as to whether the pretrial stipulation is effective unless again agreed to by a defendant at the time a juror or jurors have to be excused."¹² The proposed amendment resolves this doubt in favor of the effectiveness of the pretrial stipulation.

Rule 23(c).—Rule 23(c) currently provides that, in a case tried without a jury, the court must make a general finding ("guilty" or "not guilty") and, on request, must find the facts specially. The proposed amendment would make two changes in the rule. It would change the rule so that a request for a special finding would have to be made "before the general finding." In addition, it would add a provision that the findings could be made orally.

The Advisory Committee note indicate that the proposed amendment is designed to resolve an ambiguity in the present rule by clarifying the deadline for requesting a special finding of the facts. The note also suggests that findings of fact need not be made in writing, since oral findings would become a part of the record of the case and be available to an appellate court in the event of an appeal.

B. Legislative Action

Section 2(b) (1) of H.R. 5864 approves the proposed amendment to Rule 23(b). The committee received no adverse comment on that amendment.¹³

Section 2(b) (2) of the bill approves with substantive and technical modifications the amendment to Rule 23(c). The substantive modification changes the rule's policy concerning when a special finding must be made. The current policy of the rule requires a special finding of the facts only when requested, and the proposed amendment would leave that policy intact. H.R. 5864 changes the policy of the rule to require a special finding of the facts whenever there is a guilty verdict, unless the defendant waives the special finding.

The committee believes that to require a defendant to request special findings before the court makes its general finding, puts defense counsel in the awkward position of indicating a lack of confidence in the defendant's case. Further, the committee found no compelling reason why special findings should be made only upon request. Requiring a special finding unless waived should not impose a burden on the court. The court knows the reasons for its action at the time it makes the general finding, and it can easily set forth these reasons, either orally or in writing, at that time.

In civil cases, the court is required to make special findings of fact "in *all* actions tried upon the facts without a jury." Rule 52(a), Federal Rules of Civil Procedure (emphasis added). H.R. 5864 makes the practice in criminal cases consistent with the practice in civil cases.

Rule 24. Trial Jurors

A. Proposed Amendment

Rule 24(b) deals with peremptory challenges to prospective jurors. (A peremptory challenge permits a party to excuse a prospective

¹² *Id.*

¹³ The committee interprets Rule 23(b), as changed by the proposed amendment, to permit a stipulation to be conditional. For example, the parties may stipulate that the trial can continue with a jury of less than 12 persons, but only if the jury is not reduced below a certain size. See Advisory Committee note to proposed amendment to Rule 23, H. Doc. 94-349, at 12.

juror without stating a reason.) The rule presently provides that in capital cases each side is entitled to 20 peremptory challenges; in felony cases the prosecution is entitled to 6 challenges and the defense 10; and in misdemeanor cases, each side is entitled to 3 challenges.

The proposed amendment to the rule would change it in a very significant way. Of all the proposed amendments, it probably drew the most vigorous criticism.

The proposed amendment would reduce the number of peremptory challenges in each category of cases. In addition, it would equalize the number of prosecution and defense peremptory challenges in felony cases. The following chart compares the present rule with the rule as it is proposed to be amended.

	Prosecution			Defense		
	Present	Proposed	Change	Present	Proposed	Change
Capital.....	20	12	-8	20	12	-8
Felony.....	6	5	-1	10	5	-5
Misdemeanor.....	3	2	-1	3	2	-1

The Advisory Committee note suggests three reasons for the proposed amendment to Rule 24(b). First, the enactment of the Jury Selection and Service Act of 1968 has led to more representative jury panels. This makes it possible to reduce the number of peremptory challenges without jeopardizing the seating of a representative jury. It also eliminates the need for the defense to have more challenges than the prosecution in felony cases. Second, the proposed amendment will make it difficult systematically to exclude a class of persons from the jury. Third, a reduction in the number of challenges will "accelerate the voir dire procedure and facilitate savings in juror costs through the use of smaller jury panels."¹⁴

B. Legislative Action

Section 2(c) of H.R. 5864 disapproves the proposed amendment to Rule 24(b).

The committee is not convinced that there is a need for a change in Rule 24. The testimony and statistics presented to it do not justify reducing the number of peremptory challenges, nor do they justify giving the prosecution and defense the same number of peremptory challenges in felony cases.

The Jury Selection Act rationale is not persuasive. The issue facing the parties is whether a potential juror is biased. Bias is as likely to exist in a panel drawn under the Jury Selection Act as it is in a panel drawn from a more narrow base.¹⁵ The basic problem seems to be in the voir dire procedures. The testimony before the Subcommittee on Criminal Justice indicates that in most Federal courts the judge conducts voir dire. Only rarely are counsel permitted to question prospective jurors directly.¹⁶ This makes it difficult for counsel to identify biased jurors and develop grounds to challenge for cause. As long as

¹⁴ Advisory Committee note to proposed amendment to Rule 24, H. Doc. No. 94-464, at 14, quoting from a report prepared by the Judicial Conference's Committee on the Operation of the Jury System.

¹⁵ See statement of Jay Schulman on behalf of the National Jury Project.

¹⁶ The Judicial Conference recently reaffirmed that voir dire should be conducted by the judge. See Washington Post, March 12, 1977, at p. A-6, col. 1.

Federal courts rely upon judge-conducted voir dire, the committee believes that it is unwise to reduce the number of peremptory challenges.

The rationale that reducing the number of peremptories will eliminate the systematic exclusion of certain groups of people is also unpersuasive. Since the number of defense peremptories was reduced more than the number of prosecution peremptories, that rationale seems to be bottomed upon an assumption that it is defense counsel who are using peremptory challenges systematically to exclude classes of people. The testimony and statistics presented to the Subcommittee on Criminal Justice indicate that, on the contrary, it is the prosecution that most often uses peremptories in that fashion. More basically, it can be questioned whether it is desirable to introduce a proportionality notion into jury selection procedures.

Finally, the committee is unpersuaded by the time rationale. The amount of time that might be saved by the proposed amendment is slight and does not, in itself, warrant making the change in the rule.

Rule 40.1 Removal from State Court

A. Proposed Amendment

Rule 40.1 is a new rule to deal with removal of a criminal case from State to Federal court. The procedure for removal of criminal, as well as civil, cases is currently governed by 28 U.S.C. section 1446.

The removal statute provides that a defendant who wants to remove a criminal case from State to Federal court must file a petition with the district court of the United States for the district and division within which the case is pending. 28 U.S.C. section 1446(a). This petition may be filed "at any time before trial". 28 U.S.C. section 1446(c). The defendant must give to all adverse parties written notice of the filing of the petition. The defendant must also file a copy of the removal petition with the clerk of the State court. This filing "shall effect the removal and the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. section 1446(e).

Proposed Rule 40.1 provides that a removal petition "shall be made not later than 10 days after the arraignment in state court except . . . for good cause shown . . ." The removal petition must set forth all of the grounds for removal of the case. A second removal petition may only be based upon grounds not existing at the time the first petition was filed—any grounds which existed when the first petition was filed and which were not included in the first petition, are deemed to be waived. The filing of a removal petition "shall not prevent the state court in which prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied."

The Advisory Committee note indicates that the new rule is designed to discourage frivolous removal petitions—those filed for the purposes of delay and disruption of the State court proceedings. "When such petitions are filed close to the commencement of trial in a State court, unnecessary delay of the State proceeding results in situations where it is determined that there are no adequate grounds for granting the petition to remove the case to Federal court."¹⁷ The

¹⁷ Advisory Committee note to Rule 40.1, H. Doc. 94-464, at 17.

Advisory Committee believes that the proposed new rule will not "adversely affect the substantive rights of defendants."¹⁸

B. Legislative Action

Section 2(d) of H.R. 5864 disapproves the proposed new rule.

The proposed rule is inconsistent in two important respects with a congressionally-enacted removal statute (28 U.S.C. section 1446); The statute provides that a removal petition may be filed at any time; the proposed rule requires that it be filed within 10 days after arraignment. The statute provides that filing a copy of the removal petition stops the State court proceedings; the proposed rule permits the State court to continue its proceedings through return of a verdict and up to the point where a judgment of conviction would be enacted.

While the committee is generally sympathetic with the goals of the proposed rule, it is also sensitive to the implications that this proposed rule has for the separation of powers doctrine.¹⁹ The committee believes it to be unwise for the Supreme Court to amend congressionally-enacted statutes by promulgating rules of procedure through the rule-making process. Due regard for a coordinate branch of Government would seem to suggest that rule changes which reverse congressionally-enacted policy ought to be accomplished by means of legislation—especially here, where the proposed changes raise other problems.

Some of these other problems are illustrated by the provision of proposed Rule 40.1(a) that requires a removal petition to be filed no later than "10 days after the arraignment in State court." This conflicts with 28 U.S.C. section 1446(c), which permits a petition to be filed at any time. Changing the filing time raises problems other than those related to the separation of powers doctrine.

Pretrial procedures in State courts are quite diverse. In some States, a criminal trial will be concluded within 10 days of arraignment. Thus, a defendant might not file a removal petition before the State court enters judgment in his case. It is not clear—either from the proposed rule or the Advisory Committee note—what would happen in an instance where a removal petition was filed within the time allowed (10 days) but after the State court had entered a judgment of guilty. If the removal petition were found meritorious, could the case still be removed to Federal court? If removed, would a trial in Federal court be barred by the double jeopardy clause of the Constitution? It seems to the committee that the proposed rule does not adequately take into account the arraignment and trial procedures in the various States. It is important that a procedural rule setting forth a time deadline for filing removal petitions be able to accommodate itself to various State procedures.

¹⁸ *Id.* at 18.

¹⁹ The committee notes that the Judicial Conference has shown a similar sensitivity to the separation of powers doctrine in regard to a proposed rule dealing with appellate review of sentences. The Advisory Committee initially suggested that a rule establishing procedures whereby a defendant could seek appellate review of his sentence be proposed through the rulemaking process. See Proposed Rule 35.1 of the Federal Rules of Criminal Procedure (September 1976 draft). The Advisory Committee received objections to that proposed new rule on the ground that the proposed rule was outside of the scope of the Supreme Court's authority under the Rules Enabling Acts. The Judicial Conference recently forwarded a draft of Rule 35.1 to Congress as a legislative proposal rather than to the Supreme Court as a proposed amendment to the Federal Rules of Criminal Procedure. See Senate Executive Communication No. 1030 of the 95th Congress.

The threshold question behind any change in the statutorily-enacted policy is whether the present procedures present a serious problem to the Federal courts.

It was questioned during the hearings conducted by the Subcommittee on Criminal Justice whether removal petitions actually present such a problem to the Federal courts that any change in procedure is required. Representatives of the Judicial Conference testified before the Subcommittee on Criminal Justice that it was their impression that removal petitions did represent a problem to the Federal courts, but they had no statistics available to support this impression.

In view of the need for additional information about the nature and scope of the problem that removal petitions present to Federal courts, and in view of the need for additional information about such matters as State court arraignment and trial practices, the committee believes it desirable to disapprove the proposed rule and to deal separately with removal petition procedures. The chairman of the Subcommittee on Criminal Justice, at the request of that subcommittee, has introduced a bill (H.R. 5866) upon which the subcommittee can act. The provisions of H.R. 5866 embody the substance of the proposed rule.

Rule 41. Search and Seizure

A. Proposed Amendment

Rule 41(c) deals with the issuance of search warrants. The proposed amendment would add to the rule a new subdivision providing

When the circumstances make it reasonable to do so in the absence of a written affidavit, a search warrant may be issued upon sworn oral testimony of a person who is not in the physical presence of a federal magistrate provided the federal magistrate is satisfied that probable cause exists for the issuance of the warrant.

The new subdivision would specifically authorize the communication of such oral testimony "by telephone or other appropriate means." Before approving the issuance of a warrant on this basis, the magistrate would have to require the person requesting the warrant to read to him, verbatim, its contents. If the magistrate approves issuance of the warrant, the person requesting it would then have to sign the magistrate's name on a copy of it. If a search under this procedure is allowed, the copy of the warrant in the possession of the person who requested it would have to be returned to the magistrate.

The Advisory Committee note points out that the preferred method of conducting a search is with a search warrant. The note indicates that the rationale for the proposed change is to encourage Federal law enforcement officers to seek search warrants in situations when they might otherwise conduct warrantless searches. "Federal law enforcement officers are not infrequently confronted with situations in which the circumstances are not sufficiently 'exigent' to justify the serious step of conducting a warrantless search of private premises, but yet there exists a significant possibility that critical evidence would be lost in the time it would take to obtain a search warrant by traditional means."²⁰

²⁰ Advisory Committee note to proposed amendment to Rule 41(c), H. Doc. No. 94-464, at 22.

B. Legislative Action

Section 2(e) of H.R. 5864 disapproves the proposed amendment to Rule 41(c).

The committee approves the goal of encouraging Federal law enforcement officers to seek search warrants in situations where they might otherwise conduct warrantless searches. As the Supreme Court has observed, "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants whenever reasonably practicable." *Trupiano v. United States*, 334 U.S. 699, 705 (1948), quoted with approval in *Chimel v. California*, 395 U.S. 752, 758 (1969).

During its hearings, the Subcommittee on Criminal Justice received objections to the proposed amendment on the ground that it would not have the intended result of encouraging the use of warrants. It was asserted that the telephone warrant procedure would instead be used in lieu of the present procedure, where the person seeking the warrant must personally appear before the magistrate.²¹

The committee is concerned that any telephone search warrant procedure actually encourage the obtaining of warrants and discourage resort to warrantless searches. A search warrant is an important safeguard of a person's fourth amendment protection from "unreasonable searches and seizures."

The procedure incident to securing a warrant—which involves balancing the need for police intrusion against the individual's right to be secure in his person, property, and effects—is designed to ensure that only after a judicial consideration will a search be allowed. The determination of probable cause, the evaluation of relevant facts by a detached and impartial magistrate, is the key element in the protection of individual privacy against invasions by public officials. This review represents the only practical opportunity to prevent unreasonable police intrusions before they take place.

Note, "Oral Search Warrants: A New Standard of Warrant Availability." 21 UCLA Law Review 691, 691-92 (1973) (footnotes omitted).

Two States—Arizona and California—presently have statutes that provide procedures for obtaining a search warrant by telephone.²² The procedures in those States differ somewhat from the procedure established by the proposed amendment to Rule 41(c). In the time available to it, the Subcommittee on Criminal Justice was unable to obtain complete information about the experiences of those States with telephone search warrant procedures—what technological problems they have encountered; whether and under what circumstances the telephone warrant procedures have proven beneficial; and whether those procedures have led to a reduction in the number of warrantless searches or instead have been used in lieu of the traditional procedure for obtaining a search warrant.

In disapproving the proposed amendment, the committee does not necessarily disapprove of the concept of telephone search warrants.

²¹ See statement of Phyllis Skloot Bamberger on behalf of the Legal Aid Society of New York.

²² Arizona Rev. Stat. Ann. secs. 13-1444(c), 13-1445(c) (1973 Suppl.); California Penal Code secs. 1526(b), 1528(b) (1974 West Suppl.).

It believes that the concept merits further study and consideration. A Federal procedural rule in this area ought to be drafted in light of the experience in States that have such procedures. The Chairman of the Subcommittee on Criminal Justice, at the request of that subcommittee, has introduced a bill (H.R. 5865) to serve as a legislative vehicle for further study and consideration of telephone search warrant procedures. The bill, which embodies the substance of the proposed amendment, will be the subject of hearings by the subcommittee starting in late April.

Section 3

Section 3(a) of H.R. 5864 provides that the effective date of section 1 of the bill is the date of enactment of the legislation, and the effective date of section 2 is October 1, 1977. Thus, the amendments that the bill disapproves will not go into effect at all. Those amendments that are approved, either as written or with modifications, will take effect on October 1, 1977. Changing the effective date from August 1, 1977, which is the date presently provided for by Public Law 94-349, to October 1, 1977, will give the legal community at least 60 days to learn about the changes the legislation makes in the proposed amendments.

COST

Pursuant to clause 7, rule XIII, of the Rules of the House of Representatives, the committee estimates that no new cost to the United States is entailed by H.R. 5864.

NEW BUDGET AUTHORITY

No statement on this legislation has been received from the House Committee on Government Operations.

INFLATION IMPACT STATEMENT

H.R. 5864 will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

OVERSIGHT

The committee makes no oversight findings.

COMMITTEE VOTE

H.R. 5864 was reported out of committee on Tuesday, April 5, by voice vote. Twenty-three members of the committee were present.

ADDITIONAL VIEWS OF MR. WIGGINS TO H.R. 5864

Although supporting H.R. 5864, I must disagree with its approach to Rule 6(e) in section 2(a) (1). By disapproving the Supreme Court's proposed amendment the bill preserves a certain measure of uncertainty of application which has arisen regarding it.

The Supreme Court, in the amendment proposed, attempted to make it clear that Attorneys for the Government in the performance of their duties with a grand jury, possess the authority to utilize the services of other government employees. Indeed, it can be no other way.

Federal crimes are "investigated" by the FBI, the IRS, or by Treasury agents, and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries. Often the prosecutors need the assistance of the agents in evaluating evidence. Also, if further investigation is required during or after grand jury proceedings, or even during the course of criminal trials, the Federal agents must do it. There is no reason for a barrier of secrecy to exist between the facets of the criminal justice system which we all depend on to enforce the criminal laws.

The parameters of the authority of an attorney for the government to disclose grand jury information in the course of performing his own duties is not defined by Rule 6. However, a commonsense interpretation prevails, permitting "Representatives of other government agencies actively assisting United States Attorneys in a grand jury investigation . . . access to grand jury material in the performance of their duties." *U.S. v. Evans*, 526 F. 2d 701 (5th Cir. 1976). See also *U.S. v. Hoffa*, 349 F. 2d 20, 43 (6th Cir. 1965); *U.S. v. U.S. District Court*, 238 F 2d 713 (4th Cir. 1975) *cert. den., sub nom. Valley Bell Dairy Co. v. U.S.*, 352 U.S. 981; *U.S. v. Culver*, 224 F. Supp. 419, 432 (D. Md. 1963); *U.S. v. Anzelmo*, 319 F. Supp. 1106, 1116 (E.D. La. 1970).

In the course of considering H.R. 5864, U.S. Attorneys and the Justice Department were surveyed as to their perception of current practice regarding grand jury disclosures. Although the view was not strictly uniform, there was general agreement that disclosures at least to criminal investigative agents and other divisions within the Justice Department were permissible without court order. Yet projected against this current practice, and the weight of case law, is the anomalous language of Rule 6(e) itself.

Considering whether a motion to quash a grand jury subpoena was appealable, Mr. Justice Frankfurter applied a rationale particularly relevant to any discussion of proper grand jury functioning.

The duration of its [the grand jury's] life, frequently short, is limited by statute. It is no less important to safeguard

against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the 'orderly progress' of investigation should no more be encouraged in one case than in the other", *Cobbledick v. U.S.*, 309 U.S. 323, 327 (1940).

Clarifying Rule 6(e) without "obstructing the 'orderly progress' of investigation" requires examination of the justification for the policy of grand jury secrecy, since this policy has been urged against investigative disclosures. *J.R. Simplot Co. v. U.S. District Court for the District of Idaho*, Nos. 76-1893, 76-1995, decided November 12, 1976, (9th Circuit).

The traditional reasons for grand jury secrecy were stated in *U.S. v. Amazon Industrial Chemical Corporation*, 55 F.2d 254, 261 (D. Md. 1931):

(1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standarding trial where there was no probability of guilt.

Nevertheless it is recognized that secrecy yields "when its strict application would defeat the ends of justice". *U.S. v. Rose*, 215 F.2d 617 (3d Cir. 1954). Is not the "orderly progress of investigation" one of the "ends of justice" apt to be defeated by strict application of secrecy against criminal investigative disclosures? How would public policy or any traditional reasons for secrecy be thus served?

Grand juries, of course, may not be used to directly promote or investigate civil or administrative actions. However, it neither prevents that abuse nor allows from any of the above articulated reasons for grand jury secrecy, to inhibit disclosures to *federal criminal investigative* personnel assisting the grand jury. Nor does it serve these goals to interpose the court as a referee between the grand jury and its criminal investigative support. As has been pointed out, the court's proper role comes only at a later stage to prevent civil misuse:

While we hold that the district court cannot properly interfere with the action of the grand jury in turning over to third persons, including treasury agents, voluminous records and accounts for the sole purpose of examination and report to the grand jury, as an assistance to it, we also hold that persons, nonmembers of the grand jury thus having access to said records, and documents, have no right to use them for any purpose whatsoever except to assist the grand jury in its

work. *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956).

Therefore, we propose that the existing language of Rule 6(e) be amended by deleting its first sentence and inserting in its place the following two:

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties, and to such other government personnel as are necessary to assist attorneys for the government in the performance of such duties. For the purposes of this subdivision, "other government personnel" means employees of the Department of Justice, or employees of other governmental agencies who, by law, investigate violations of the Federal criminal law.

This would limit the assistance available as a matter of course to the grand jury to Federal criminal investigative personnel. It would not prevent the jury from seeking further assistance from purely civil investigative or administrative personnel pursuant to the court order required in the second sentence of the existing rule.

The danger in leaving Rule 6(e) in its present state of uncertainty was demonstrated by a recent Ninth Circuit decision, which asserts ". . . the Government must show the necessity [to the Court] for each particular person's aid rather than showing merely a general necessity for assistance, expert or otherwise." *Simplot*, supra, (slip opinion, p. 9). Relying in great part upon an article entitled *Administrative Agency Access to Grand Jury Materials* (75 Columbia Law Review 162 (1975)) the court in *Simplot* spreads this required showing with such a broad and dripping brush as to reach beyond the borders of the problem. However salutary this may seem when applied to administrative agencies and civil investigative personnel, it is a prophylaxis both unwarranted and disruptive when grand jury disclosure is made to criminal investigative personnel since it impedes the grand jury's very purpose.

No useful purpose is served by foregoing this opportunity to clarify a rule so temptingly vague. Leaving the matter for courts to "flush out" at their individual will or whim merely deepens the uncertainty.

CHARLES E. WIGGINS.

APPENDIX 7

95th Congress }
1st Session }

COMMITTEE PRINT

{ No. 1

AMENDMENTS
FEDERAL RULES OF CRIMINAL PROCEDURE
TRANSMITTED TO CONGRESS ON
APRIL 26, 1976

SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-FIFTH CONGRESS
FIRST SESSION



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(II)

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

MONDAY, APRIL 26, 1976

ORDERED:

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rule 40.1 and amendments to Rules 6(e), 6(f), 23(b), 23(c), 24(b), 41(a), 41(c), and 50(b) as hereinafter set forth:

Rule 6. The grand jury.

* * * * *

(e) *Secrecy of proceedings and disclosure.*—Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. For purposes of this subdivision, "attorneys for the government" includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any per-

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son except in accordance with this rule. The federal magistrate to whom an indictment is returned may direct that it shall be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) *Finding and return of indictment.*—An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreman shall so report to a federal magistrate in writing forthwith.

Rule 23. Trial by jury or by the court.

* * * * *

(b) *Jury of less than twelve.*—Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

(c) *Trial without a jury.*—In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Rule 24. Trial jurors.

* * * * *

(b) *Peremptory challenges.*

(1) *Number of challenges.*

(A) *Capital cases.*—If the offense charged is punishable by death, each side is entitled to 12 peremptory challenges.

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(B) *Felony cases*.—If the offense charged is punishable by imprisonment for more than one year, each side is entitled to 5 peremptory challenges.

(C) *Misdemeanor cases*.—If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 2 peremptory challenges.

(2) *Relief from limitations*.

(A) *For cause*.—For good cause shown, the court may grant such additional challenges as it, in its discretion, believes necessary and proper.

(B) *Multiple defendants*.—If there is more than one defendant the court may allow the parties additional challenges and permit them to be exercised separately or jointly.

(C) *Time for making motion*.—A motion for relief under (b)(2) shall be filed at least 1 week in advance of the first scheduled trial date or within such other time as may be provided by the rules of the district court.

Rule 40.1. Removal from state court.

(a) *Time for filing*.—A petition for removal of a criminal prosecution from a state court to a United States district court shall be filed in the district court for the federal judicial district in which the state prosecution is pending. Such petition shall be made not later than 10 days after the arraignment in state court except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(b) *Number of petitions*.—A petition for removal of a state criminal prosecution to a United States district court must include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition.

For good cause shown, the United States district court may grant relief from the limitation of this subdivision.

(c) *Proceedings.*—The filing of a petition for removal shall not prevent the state court in which prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(1) The district court to which the petition is directed shall examine it promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(2) If the district court does not order the summary dismissal of the petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the district court determines that the petition shall be granted, it shall so notify the state court in which prosecution is pending, which shall proceed no further.

Rule 41. Search and seizure.

(a) *Authority to issue warrant.*—A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(c) *Issuance and contents.*

(1) *Warrant upon affidavit.*—A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place

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to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) *Warrant upon oral testimony.*—When the circumstances make it reasonable to do so in the absence of a written affidavit, a search warrant may be issued upon sworn oral testimony of a person who is not in the physical presence of a federal magistrate provided the federal magistrate is satisfied that probable cause exists for the issuance of the warrant. The sworn oral testimony may be communicated to the magistrate by telephone or other appropriate means and shall be recorded and transcribed. After transcription the statement must be certified by the magistrate and filed with the court. This statement shall be deemed to be an affidavit for purposes of this rule.

(A) *Method of issuance.*—The grounds for issuance and the contents of the warrant shall be those required by subdivision (c)(1) of this rule. Prior to approval of the warrant, the magistrate shall require the federal law enforcement officer or the attorney for the government who is requesting the warrant to read to him, verbatim, the contents of the warrant. The magistrate may di-

rect that specific modifications be made in the warrant. Upon approval, the magistrate shall direct the federal law enforcement officer or the attorney for the government who is requesting the warrant to sign the magistrate's name on the warrant. This warrant shall be called a duplicate original warrant and shall be deemed a warrant for purposes of this rule. In such cases, the magistrate shall cause to be made an original warrant. The magistrate shall enter the exact time of issuance of the duplicate original warrant on the face of the original warrant.

(B) *Return*.—Return of the duplicate original warrant and the original warrant shall be in conformity with subdivision (d) of this rule. Upon return, the magistrate shall require the person who gave the sworn oral testimony establishing the grounds for issuance of the warrant, to sign a copy of it.

Rule 50. Calendars; plans for prompt disposition.

(b) *Plans for achieving prompt disposition of criminal cases*.—To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare plans for the prompt disposition of criminal cases in accordance with the provisions of Chapter 208 of Title 18, United States Code.

2. That the foregoing amendments and addition to the rules of procedure shall take effect on August 1, 1976, and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and addition to the Rules of Criminal Procedure in accordance with the provisions of Title 18, United States Code, Sections 3771 and 3772.

APPENDIX A

Excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the U.S.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The Grand Jury

1 * * *

2 (e) **SECURITY OF PROCEEDINGS AND DISCLO-**

3 **SURE.** Disclosure of matters occurring before

4 the grand jury other than its deliberations and

5 the vote of any juror may be made to the at-

6 torneys for the government for use in the per-

7 formance of their duties. *For purposes of this*

8 *subdivision, "attorneys for the government" in-*

9 *cludes those enumerated in rule 54(c); it also*

10 *includes such other government personnel as are*

11 *necessary to assist the attorneys for the govern-*

12 *ment in the performance of their duties.* Otherwise

13 a juror, attorney, interpreter, stenographer,

14 operator of a recording device, or any typist

15 who transcribes recorded testimony may dis-

16 close matters occurring before the grand jury

17 only when so directed by the court preliminarily

18 to or in connection with a judicial proceeding

19 or when permitted by the court at the request

20 of the defendant upon a showing that grounds

21 may exist for a motion to dismiss the indictment

22 because of matters occurring before the grand

23 jury. No obligation of secrecy may be imposed

24 upon any person except in accordance with this

25 rule. *The federal magistrate to whom an indict-*

26 *ment is returned* ~~court~~ may direct that an indictment
 27 ~~ment it~~ shall be kept secret until the defendant
 28 is in custody or has ~~given bail~~, *been released*
 29 *pending trial. Thereupon* the clerk shall seal
 30 the indictment and no person shall disclose the
 31 finding of the indictment except when necessary
 32 for the issuance and execution of a warrant or
 33 summons.

32 (f) FINDING AND RETURN OF INDICTMENT. An
 33 indictment may be found only upon the con-
 34 currence of 12 or more jurors. The indictment
 35 shall be returned by the grand jury to a judge
 36 *federal magistrate* in open court. If ~~the defendant~~
 37 ~~is in custody or has given bail~~ *a complaint or*
 38 *information is pending against the defendant*
 39 and 12 jurors do not concur in finding an in-
 40 dictment, the foreman shall so report to ~~the~~
 41 ~~court~~ *a federal magistrate* in writing forthwith.

ADVISORY COMMITTEE NOTE

(Rule 6)

The proposed definition of "attorneys for the government" in subdivision (e) is designed to facilitate an increasing need, on the part of government attorneys, to make use of outside expertise in complex litigation. The phrase "other government personnel" includes, but is not limited to, employees of administrative agencies and government departments.

Present subdivision (e) provides for disclosure "to the attorneys for the government for use in the performance of their duties." This limitation is designed to further "the long established policy that maintains the secrecy of the grand jury in federal courts." *United States v. Procter and Gamble Co.*, 356 U.S. 677 (1958).

As defined in rule 54(c), "'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam * * *." The limited

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nature of this definition is pointed out in *In re Grand Jury Proceedings*, 309 F. 2d 440 (3d Cir. 1962) at 443:

The term attorneys for the government is restrictive in its application. . . . If it had been intended that the attorneys for the administrative agencies were to have free access to matters occurring before a grand jury, the rule would have so provided.

The proposed amendment reflects the fact that there is often government personnel assisting the Justice Department in grand jury proceedings. In *In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971), the opinion quoted the United States Attorney:

It is absolutely necessary in grand jury investigations involving analysis of books and records, for the government attorneys to rely upon investigative personnel (from the government agencies) for assistance.

See also 8 J. Moore, Federal Practice ¶6.05 at 6-28 (2d ed. Cipes, 1969):

The rule [6(e)] has presented a problem, however, with respect to attorneys and nonattorneys who are assisting in preparation of a case for the grand jury. . . . These assistants often cannot properly perform their work without having access to grand jury minutes.

Although case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their expertise is required. This is subject to the qualification that the matters disclosed be used only for the purposes of the grand jury investigation. The court may inquire as to the good faith of the assisting personnel, to ensure that access to material is not merely a subterfuge to gather evidence unattainable by means other than the grand jury. This approach was taken in *In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa. 1971); *In re April 1966 Term Grand Jury*, 239 F. 2d 263 (7th Cir. 1956); *United States v. Anselmo*, 319 F. Supp. 1106 (D.C. La. 1970). Another case, *Application of Kelly*, 19 F.R.D. 269 (S.D.N.Y. 1956), assumed, without deciding, that assistance given the attorney for the government by IRS and FBI agents was authorized.

The change at line 27 reflects the fact that under the Bail Reform Act of 1966 some persons will be released without requiring bail. See 18 U.S.C. §§ 3146, 3148.

Under the proposed amendment to rule 6(f), an indictment may be returned to a federal magistrate. ("Federal magistrate" is defined in rule 54(c) as including a United States magistrate as defined in 28 U.S.C. § 631-639 and a judge of the United States.) This change will foreclose the possibility of noncompliance with the Speedy Trial Act timetable because of the nonavailability of a judge. Upon the effective date of certain provisions of the Speedy Trial Act of 1974, the timely return of indictments will become a matter of critical importance; for the year commencing July 1, 1976, indictments must be returned within 60 days of arrest or summons, for the year following within 45 days, and thereafter within 30 days. 18 U.S.C. §§ 3161(b) and (f), 3163(a). The problem is acute in a one-judge district where, if the judge is holding court in another part of the district, or is otherwise absent, the return of the indictment must await the later reappearance of the judge at the place where the grand jury is sitting.

A corresponding change has been made to that part of subdivision (f) which concerns the reporting of a "no bill," and to that part of subdivision (e) which concerns keeping an indictment secret.

The change in the third sentence of rule 6(f) is made so as to cover all situations in which by virtue of a pending complaint or information the defendant is in custody or released under some form of conditional release.

Rule 23. Trial by Jury or by the Court

* * *

1 (b) JURY OF LESS THAN TWELVE. Juries
 2 shall be of 12 but at any time before verdict
 3 the parties may stipulate in writing with
 4 the approval of the court that the jury shall
 5 consist of any number less than 12; *or that*
 6 *a valid verdict may be returned by a jury of*
 7 *less than 12 should the court find it neces-*
 8 *sary to excuse one or more jurors for any*
 9 *just cause after trial commences.*

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10 (c) TRIAL WITHOUT A JURY. In a case
 11 tried without a jury the court shall make a
 12 general finding and shall in addition, on
 13 request *made before the general finding*, find
 14 the facts specially. *Such findings may be*
 15 *oral*. If an opinion or memorandum of deci-
 16 sion is filed, it will be sufficient if the find-
 17 ings of fact appear therein.

ADVISORY COMMITTEE NOTE

(Rule 23)

The amendment to subdivision (b) makes it clear that the parties, with the approval of the court, may enter into an agreement to have the case decided by less than twelve jurors if one or more jurors are unable or disqualified to continue. For many years the Eastern District of Virginia has used a form entitled, "Waiver of Alternate Jurors." In a substantial percentage of cases the form is signed by the defendant, his attorney, and the Assistant United States Attorney in advance of trial, generally on the morning of trial. It is handled automatically by the courtroom deputy clerk who, after completion, exhibits it to the judge.

This practice would seem to be authorized by existing rule 23(b), but there has been some doubt as to whether the pretrial stipulation is effective unless again agreed to by a defendant at the time a juror or jurors have to be excused. See 8 J. Moore, Federal Practice ¶ 23.04 (2d. ed. Cipes, 1969); C. Wright, Federal Practice and Procedure: Criminal § 373 (1969). The proposed amendment is intended to make clear that the pretrial stipulation is an effective waiver, which need not be renewed at the time the incapacity or disqualification of the juror becomes known.

In view of the fact that a defendant can make an effective pretrial waiver of trial by jury or by a jury of twelve, it would seem to follow that he can also effectively waive trial by a jury of twelve in situations where a juror or jurors cannot continue to serve.

As has been the practice under rule 23(b), a stipulation addressed to the possibility that some jurors may later be

excused need not be open-ended. That is, the stipulation may be conditioned upon the jury not being reduced below a certain size. See, e.g., *Williams v. United States*, 332 F.2d 36 (7th Cir. 1964) (agreement to proceed if no more than 2 jurors excused for illness); *Rogers v. United States*, 319 F.2d 5 (7th Cir. 1963) (same).

Subdivision (c) is changed to make clear the deadline for making a request for findings of fact and to provide that findings may be oral. The oral findings, of course, become a part of the record, as findings of fact are essential to proper appellate review on a conviction resulting from a nonjury trial. *United States v. Livingston*, 459 F.2d 797 (3d Cir. 1972).

The meaning of current subdivision (c) has been in some doubt because there is no time specified within which a defendant must make a "request" that the court "find the facts specially." See, e.g., *United States v. Rivera*, 444 F.2d 136 (2d Cir. 1971), where the request was not made until the sentence had been imposed. In the opinion the court said:

This situation might have raised the interesting and apparently undecided question of when a request for findings under Fed. R. Crim. P. 23(c) is too late, since Rivera's request was not made until the day after sentence was imposed. See generally *Benchwick v. United States*, 297 F.2d 330, 335 (9th Cir. 1961); *United States v. Morris*, 263 F.2d 594 (7th Cir. 1959).

Rule 24. Trial Jurors

* * *

1 (b) PEREMPTORY CHALLENGES. If the offense
2 charged is punishable by death, each side is
3 entitled to 20 peremptory challenges. If the
4 offense charged is punishable by imprisonment
5 for more than one year, the government is
6 entitled to 6 peremptory challenges and the
7 defendant or defendants jointly to 10 peremp-
8 tory challenges. If the offense charged is
9 punishable by imprisonment for not more
10 than one year or by fine or both, each side is
11 entitled to 3 peremptory challenges. If there
12 is more than one defendant, the court may

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13

13 allow the defendants additional peremptory
 14 challenges and permit them to be exercised
 15 separately or jointly.

16 (1) *NUMBER OF CHALLENGES.*

17 (A) *CAPITAL CASES.* If the offense charged
 18 is punishable by death, each side is entitled to
 19 12 peremptory challenges.

20 (B) *FELONY CASES.* If the offense charged
 21 is punishable by imprisonment for more than one
 22 year, each side is entitled to 5 peremptory chal-
 23 lenges.

24 (C) *MISDEMEANOR CASES.* If the offense
 25 charged is punishable by imprisonment for not
 26 more than one year or by fine or both, each side is
 27 entitled to 2 peremptory challenges.

28 (2) *RELIEF FROM LIMITATIONS.*

29 (A) *FOR CAUSE.* For good cause shown, the
 30 court may grant such additional challenges as it,
 31 in its discretion, believes necessary and proper.

32 (B) *MULTIPLE DEFENDANTS.* If there is more
 33 than one defendant the court may allow the
 34 parties additional challenges and permit them
 35 to be exercised separately or jointly.

36 (C) *TIME FOR MAKING MOTION.* A motion for
 37 relief under (b)(2) shall be filed at least 1 week
 38 in advance of the first scheduled trial date or
 39 within such other time as may be provided by the
 40 rules of the district court.

ADVISORY COMMITTEE NOTE

(Rule 24)

Subdivision (b) (1) is revised to reduce the number of per-
 emptory challenges available to each side and to give both

defense and the government an equal number of peremptory challenges.

At the October 1971 session of the Judicial Conference, the Conference, upon the recommendation of its Committee on the Operation of the Jury System, adopted the following resolution:

The Judicial Conference of the United States refers to the Committee on the Rules of Practice and Procedure for its favorable consideration the recommendation of the Committee on the Operation of the Jury System that Rule 24(b) be amended to fix the number of peremptory challenges in capital cases at twelve for each side, in other felony cases at five, and in misdemeanors at two, and for good cause shown, to grant such additional challenges as the court in its discretion shall permit.

The report of the Committee on the Operation of the Jury System said:

The practice of permitting a large number of peremptory challenges in criminal cases has been criticized as contrary to the cross-sectional policies of the Jury Selection and Service Act of 1968. Revision of the applicable provision, Rule 24(b) of the Federal Rules of Criminal Procedure, was proposed as early as 1962 in a Preliminary Draft of Proposed Amendments to the Rules of Criminal Procedure circulated to bench and bar by the Committee on Rules of Practice and Procedure. Although the proposal was not adopted at that time, Congress, in the 1968 Jury Act, has since declared it the express policy of the United States that all litigants "shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. § 1861. Reconsideration of the question therefore appears appropriate.

The Committee recognizes the value of peremptory challenges in assuring a fair trial, particularly in the unusual case where large numbers of the community may have adopted a view on the merits of the trial. But to prevent misuse of the peremptory challenge as a means of systematic elimination of members of a given group from the jury, the Committee believes that the number of challenges permitted in the normal case should be reduced. The Committee also notes that a reduction in peremptory challenges would accelerate the *voir dire* procedure and facilitate savings in juror costs through the use of smaller jury panels. The Committee believes that the needs of unusual cases are best served by a discretionary power in the trial judge to grant additional challenges to either side when the appropriate showing is made.

The Committee also was of the consensus that the prosecution and the defense should normally be granted an equal number of peremptory challenges. At present, the defense may exercise ten peremptories

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and the prosecution only six in non-capital felony cases. Little justification for this disparity is apparent. Proper use of peremptories by the government can contribute to a fair trial as effectively as proper use by the defendant. The Committee notes, moreover, that Congress has adopted the principle of equality in its most recent legislation dealing with the question, the District of Columbia Court Reorganization Act of 1970.

In the opinion of the Advisory Committee, a reduction in the number of peremptory challenges is desirable for reasons given in the report of the Judicial Conference Committee on the Operation of the Jury System. Retaining provision for peremptory challenges where the offense charged is punishable by death is a recognition that legislation imposing the death penalty may pass constitutional scrutiny.

Subdivision (b) (2) gives the court discretion to increase the number of challenges and provides for the time within which a motion for relief under subdivision (b) (2) must be made. The increase need not result in the same number of challenges for each side.

Rule 40.1. Removal from State Court

1 (a) *TIME FOR FILING.* A petition for removal
 2 of a criminal prosecution from a state court to a
 3 United States district court shall be filed in the
 4 district court for the federal judicial district in
 5 which the state prosecution is pending. Such peti-
 6 tion shall be made ~~within~~ not later than 10 days
 7 after the arraignment in state court except that
 8 for good cause shown the United States district
 9 court may enter an order granting the petitioner
 10 leave to file the petition at a later time.

11 (b) *NUMBER OF PETITIONS.* A petition for
 12 removal of a state criminal prosecution to a United
 13 States district court must include all grounds for
 14 such removal. A failure to state grounds which
 15 exist at the time of the filing of the petition shall
 16 constitute a waiver of such grounds, and a second
 17 petition may be filed only on grounds not existing

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18 *at the time of the original petition. For good cause*
19 *shown, the United States district court may grant*
20 *relief from the limitation of this subdivision.*

21 (c) *PROCEEDINGS. The filing of a petition for*
22 *removal shall not prevent the state court in which*
23 *prosecution is pending from proceeding further,*
24 *except that a judgment of conviction shall not*
25 *be entered unless the petition is first denied.*

26 (1) *The district court to which the petition is*
27 *directed shall examine it promptly. If it clearly*
28 *appears on the face of the petition and any ex-*
29 *hibits annexed thereto that the petition for removal*
30 *should not be granted, the court shall make an*
31 *order for its summary dismissal.*

32 (2) *If the district court does not order the sum-*
33 *mary dismissal of the petition, it shall order an*
34 *evidentiary hearing to be held promptly and after*
35 *such hearing shall make such disposition of the*
36 *petition as justice shall require. If the district*
37 *court determines that the petition shall be granted,*
38 *it shall so notify the state court in which prosecu-*
39 *tion is pending, which shall proceed no further.*

ADVISORY COMMITTEE NOTE

(Rule 40.1)

Proposed rule 40.1 specifies the place and sets the time for petitioning for removal of a criminal prosecution from a state court.

The rule is intended to facilitate the orderly and prompt disposition of a removal petition filed in federal court and to avoid unnecessary delay in the state proceeding when a removal petition is denied. Under the rule, a state proceeding must be terminated only when the federal judge signs and files an order in the district court granting the removal petition. Presently, a removal petition may be filed at any time prior to trial, 28 U.S.C. § 1446(c), and the mere filing

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of a petition requires a stay of the state proceeding. When such petitions are filed close to the commencement of trial in state court, unnecessary delay of the state proceeding results in situations where it is determined that there are no adequate grounds for granting the petition to remove the case to federal court. See, e.g., *People of the State of New York v. Hordick*, 424 F. 2d 697 (2d Cir.), cert. denied 398 U.S. 939, reh. denied 400 U.S. 883 (1970).

Subdivision (a) requires that the removal petition be filed not later than ten days after the arraignment in state court. The trend among states is to consolidate pretrial proceedings. See, e.g., *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W. 2d 753 (1965); and *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W. 2d 3 (1965). The American Bar Association Advisory Committee on Pretrial Proceedings recommends a single pretrial disposition of issues. American Bar Association Standards Relating to Discovery and Procedure Before Trial § 5.3, pp. 114-123 (Approved Draft, 1970). The proposed rule reflects an effort to act consistently with this trend by providing that the petition for removal must be made not later than ten days after the arraignment in state court, except where for good cause shown the district court allows a late filing. Compare ALI Study of the Division of Jurisdiction Between State and Federal Courts, § 1382(e) and comments at 355 (1969), allowing for removal petition at any time before trial.

Subdivision (b) requires that a petition for removal shall include all existing grounds for removal. Ordinarily, the failure to state in the petition a ground for removal will constitute a waiver of such ground. A second petition may be filed only if the grounds stated therein did not exist at the time of the original petition or for other good cause shown. This subdivision reflects the policy of consolidation of proceedings and attempts to alleviate the problem of continual disruption of state court proceedings by successive petitions for removal. See Note, Abuse of Procedure in Removal of State Criminal Prosecutions, 6 U. San Francisco L. Rev. 117, 122-123 (1971).

The Advisory Committee believes that the recommended time limit within which a petition, stating all existing

grounds for removal, must be filed will not adversely affect the substantive rights of defendants. Ten days following arraignment should be a sufficient time within which to prepare a petition, and the rule contains an appropriate safeguard when this is not so. It should also be noted that grounds for removal of a criminal prosecution from a state court are not broad. See *Johnson v. Mississippi*, — U.S. — (1975), *Georgia v. Rachel*, 384 U.S. 780 (1966), and *City of Greenwood v. Peacock*, 384 U.S. 808 (1966). See also Note, Abuse of Procedure in Removal of State Criminal Prosecutions, 6 U. San Francisco L. Rev. 117, 118 (1971).

Subdivision (c) provides that, pending a decision by the federal district court on the petition for removal, the state may continue its proceedings short of entering a judgment of conviction. This provision is intended to discourage frivolous petitions when the only purpose is to cause delay and to disrupt the state proceeding. The proposal represents a change in existing law. See *South Carolina v. Moore*, 447 F. 2d 1067 (4th Cir. 1971); Note, Abuse of Procedure in Removal of State Criminal Prosecutions, 6 U. San Francisco L. Rev. 117, 127-128 (1971). In the *Moore* case the court said:

[I]t has been uniformly held that the state court loses all jurisdiction to proceed immediately upon the filing of the petition in the federal court and a copy in the state court. Under these holdings any proceedings in the state court after the filing of the petition and prior to a federal remand order are absolutely void, despite subsequent determination that the removal petition was ineffective.

447 F. 2d at 1073

See ALI, Study of the Division of Jurisdiction Between State and Federal Courts, § 1383 and commentary at 357-359 (1969); § 1383(a):

After removal is effective, the State court shall proceed no further unless the case is remanded, except that if removal is effected while a trial is in progress, the trial may be completed in the State court, and judgment thereafter entered if the case is remanded.

Subdivision (c) goes further than the American Law Institute proposal and provides that there is no bar to the state continuing its proceedings pending a decision by the United States district court to grant the petition for removal. Con-

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trast Civil removal proceedings, 28 U.S.C. § 1446. In the *Moore* case, Judge Haynsworth pointed out that the automatic stay of the state court proceedings creates a risk of "abuse by individuals seeking to interrupt or delay state trials." He added:

It is a situation which deserves congressional attention, for that kind of disruption of state court proceedings seems wholly unnecessary and unwarranted.

447 F. 2d at 1074

In the view of the Advisory Committee, the change is a desirable one, properly made by means of the rule-making process.

Rule 41. Search and seizure

1 * * *

2 (c) ISSUANCE AND CONTENTS.

3 (1) *WARRANT UPON AFFIDAVIT*. A warrant
4 shall issue only on an affidavit or affidavits
5 sworn to before the federal magistrate or state
6 judge and establishing the grounds for issuing
7 the warrant. If the federal magistrate or state
8 judge is satisfied that grounds for the applica-
9 tion exist or that there is probable cause to
10 believe that they exist, he shall issue a warrant
11 identifying the property and naming or de-
12 scribing the person or place to be searched. The
13 finding of probable cause may be based upon
14 hearsay evidence in whole or in part. Before
15 ruling on a request for a warrant the federal
16 magistrate or state judge may require the
17 affiant to appear personally and may examine
18 under oath the affiant and any witnesses he
19 may produce, provided that such proceeding
20 shall be taken down by a court reporter or
21 recording equipment and made part of the
22 affidavit. The warrant shall be directed to a
23 civil officer of the United States authorized to

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24 enforce or assist in enforcing any law thereof
25 or to a person so authorized by the President
26 of the United States. It shall command the
27 officer to search, within a specified period of
28 time not to exceed 10 days, the person or place
29 named for the property specified. The warrant
30 shall be served in the daytime, unless the issuing
31 authority, by appropriate provision in the
32 warrant, and for reasonable cause shown,
33 authorizes its execution at times other than
34 daytime. It shall designate a federal magistrate
35 to whom it shall be returned.

36 (2) *Warrant Upon Oral Testimony.*
37 *When the circumstances make it reasonable*
38 *to do so in the absence of a written affidavit,*
39 *a search warrant may be issued upon sworn*
40 *oral testimony of a person who is not in the*
41 *physical presence of a federal magistrate*
42 *provided the federal magistrate is satisfied*
43 *that probable cause exists for the issuance of*
44 *the warrant. The sworn oral testimony may*
45 *be communicated to the magistrate by tele-*
46 *phone or other appropriate means and shall*
47 *be recorded and transcribed. After tran-*
48 *scription the statement must be certified by*
49 *the magistrate and filed with the court. This*
50 *statement shall be deemed to be an affidavit*
51 *for purposes of this rule.*

52 (A) *Method of Issuance. The grounds*
53 *for issuance and the contents of the warrant*
54 *shall be those required by subdivision (c)(1)*
55 *of this rule. Prior to approval of the*
56 *warrant, the magistrate shall require the*
57 *federal law enforcement officer or the attor-*

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58 *ney for the government who is requesting*
 59 *the warrant to read to him, verbatim, the*
 60 *contents of the warrant. The magistrate may*
 61 *direct that specific modifications be made in*
 62 *the warrant. Upon approval, the magistrate*
 63 *shall direct the federal law enforcement*
 64 *officer or the attorney for the government*
 65 *who is requesting the warrant to sign the*
 66 *magistrate's name on the warrant. This*
 67 *warrant shall be called a duplicate original*
 68 *warrant and shall be deemed a warrant for*
 69 *purposes of this rule. In such cases, the*
 70 *magistrate shall cause to be made an original*
 71 *warrant. The magistrate shall enter the exact*
 72 *time of issuance of the duplicate original*
 73 *warrant on the face of the original warrant.*
 74 *(B) Return. Return of the duplicate*
 75 *original warrant and the original warrant*
 76 *shall be in conformity with subdivision (d)*
 77 *of this rule. Upon return, the magistrate*
 78 *shall require the person who gave the sworn*
 79 *oral testimony establishing the grounds for*
 80 *issuance of the warrant, to sign a copy of it.*

ADVISORY COMMITTEE NOTE:

(Rule 41)

Rule 41(c)(2) is added to establish a procedure for the issuance of a search warrant when it is not reasonably practicable for the person obtaining the warrant to present a written affidavit to a magistrate or a state judge as required by subdivision (c)(1). At least two states have adopted a similar procedure, Ariz.Rev.Stat. Ann. §§ 13-1444(c)-1445(c) (Supp. 1973); Cal.Pen. Code §§ 1526(b), 1528(b) (West Supp. 1974), and comparable amendments are under consideration in other jurisdictions. See Israel, Legislative Regula-

tion of Searches and Seizures: The Michigan Proposals, 73 Mich.L.Rev. 221, 258-63 (1975); Nakell, Proposed Revisions of North Carolina's Search and Seizure Law, 52 N.Car.L.Rev. 277, 306-11 (1973). It has been strongly recommended that "every State enact legislation that provides for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers." National Advisory Commission on Criminal Justice Standards and Goals, Report on Police 95 (1973). Experience with the procedure has been most favorable. Miller, Telephonic Search Warrants: The San Diego Experience, 9 The Prosecutor 385 (1974).

The trend of recent Supreme Court decisions has been to give greater priority to the use of a search warrant as the proper way of making a lawful search:

It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants whenever reasonably practicable. . . . This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. *Trupiano v. United States*, 334 U.S. 699, 705 (1948), quoted with approval in *Chimel v. California*, 395 U.S. 752, 758 (1969).

See also *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); Note, *Chambers v. Maroney: New Dimensions in the Law of Search and Seizure*, 46 Indiana L.J. 257, 262 (1971).

Use of search warrants can best be encouraged by making it administratively feasible to obtain a warrant when one is needed. One reason for the nonuse of the warrant has been the administrative difficulties involved in getting a warrant, particularly at times of the day when a judicial officer is ordinarily unavailable. See L. Tiffany, D. McIntyre, and D. Rotenberg, *Detection of Crime* 105-116 (1967); LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 Mo. L. Rev. 391, 411 (1965). Federal law enforcement officers are not infrequently confronted with situations in which the circumstances are not sufficiently "exigent" to justify the serious step of conducting a warrantless search of private premises, but yet there exists a significant possibility that critical evidence would be lost in the time it would take to obtain a search warrant by traditional means. See, e.g., *United States v. Johnson*,—F.2d—(D.C. Cir. June 16, 1975).

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Subdivision (c) (2) provides that a warrant may be issued on the basis of an oral statement of a person not in the physical presence of the federal magistrate. Telephone, radio, or other electronic methods of communication are contemplated. For the warrant to properly issue, four requirements must be met:

(1) The applicant—a federal law enforcement officer or an attorney for the government, as required by subdivision (a)—must persuade the magistrate that the circumstances of time and place make it reasonable to request the magistrate to issue a warrant on the basis of oral testimony. This restriction on the issuance of a warrant recognizes the inherent limitations of an oral warrant procedure, the lack of demeanor evidence, and the lack of a written record for the reviewing magistrate to consider before issuing the warrant. See Comment, Oral Search Warrants: A New Standard of Warrant Availability, 21 U.C.L.A. Law Review 691, 701 (1974). Circumstances making it reasonable to obtain a warrant on oral testimony exist if delay in obtaining the warrant might result in the destruction or disappearance of the property [see *Chimel v. California*, 395 U.S. 752, 773-774 (1969) (White, dissenting); Landynski, The Supreme Court's Search for Fourth Amendment Standards: The Warrantless Search, 45 Conn. B.J. 2, 25 (1971)]; or because of the time when the warrant is sought, the distance from the magistrate of the person seeking the warrant, or both.

(2) The applicant must orally state facts sufficient to satisfy the probable cause requirement for the issuance of the search warrant. (See subdivision (c) (1).) This information may come from either the applicant federal law enforcement officer or the attorney for the government or a witness willing to make an oral statement. The oral testimony must be recorded at this time so that the transcribed affidavit will provide an adequate basis for determining the sufficiency of the evidence if that issue should later arise. See Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv. L. Rev. 825 (1971). It is contemplated that the recording of the oral testimony will be made by a court reporter, by a mechanical recording device, or by a verbatim contemporaneous writing by the magistrate.

Recording a telephone conversation is no longer difficult with many easily operated recorders available. See 86:2 L.A. Daily Journal 1 (1973); Miller, *Telephonic Search Warrants: The San Diego Experience*, 9 The Prosecutor 385, 386 (1974).

(3) The applicant must read the contents of the warrant to the federal magistrate in order to enable the magistrate to know whether the requirements of certainty in the warrant are satisfied. The magistrate may direct that changes be made in the warrant. If the magistrate approves the warrant as requested or as modified by the magistrate, he then issues the warrant by directing the applicant to sign the magistrate's name to the duplicate original warrant. The magistrate then causes to be made a written copy of the approved warrant. This constitutes the original warrant. The magistrate enters the time of issuance of the duplicate original warrant on the face of the original warrant.

(4) Return of the duplicate original warrant and the original warrant must conform to subdivision (d). The transcript of the sworn oral testimony setting forth the grounds for issuance of the warrant must be signed by affiant in the presence of the magistrate and filed with the court.

Because federal magistrates are likely to be accessible through the use of the telephone or other electronic devices, it is unnecessary to authorize state judges to issue warrants under subdivision (c) (2).

Although the procedure set out in subdivision (c) (2) contemplates resort to technology which did not exist when the Fourth Amendment was adopted, the Advisory Committee is of the view that the procedure complies with all of the requirements of the Amendment. The telephonic search warrant process has been upheld as constitutional by the courts, e.g., *People v. Peck*, 38 Cal.App.3d 993, 113 Cal.Rptr. 806 (1974), and has consistently been so viewed by commentators. See Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 Mich. L.Rev. 221, 260 (1975); Nakell, *Proposed Revisions of North Carolina's Search and Seizure Law*, 52 N.Car.L.Rev. 277, 310 (1973); Comment, *Oral Search Warrants: A New Standard of Warrant Availability*, 21 U.C.L.A. Rev. 691, 697 (1973).

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Reliance upon oral testimony as a basis for issuing a search warrant is permissible under the Fourth Amendment. *Campbell v. Minnesota*, 487 F.2d 1 (8th Cir. 1973); *United States ex rel. Gaugler v. Brierley*, 477 F.2d 516 (3d Cir. 1973); *Tabasko v. Barton*, 472 F.2d 871 (6th Cir. 1972); *Frazier v. Roberts*, 441 F.2d 1224 (8th Cir. 1971). Thus, the procedure authorized under subdivision (c) (2) is not objectionable on the ground that the oral statement is not transcribed in advance of the issuance of the warrant. *People v. Peck*, 38 Cal. App. 3d 993, 113 Cal. Rptr. 806 (1974). Although it has been questioned whether oral testimony will suffice under the Fourth Amendment if some kind of contemporaneous record is not made of that testimony, see dissent from denial of certiorari in *Christofferson v. Washington*, 393 U.S. 1090 (1969), this problem is not present under the procedure set out in subdivision (c) (2).

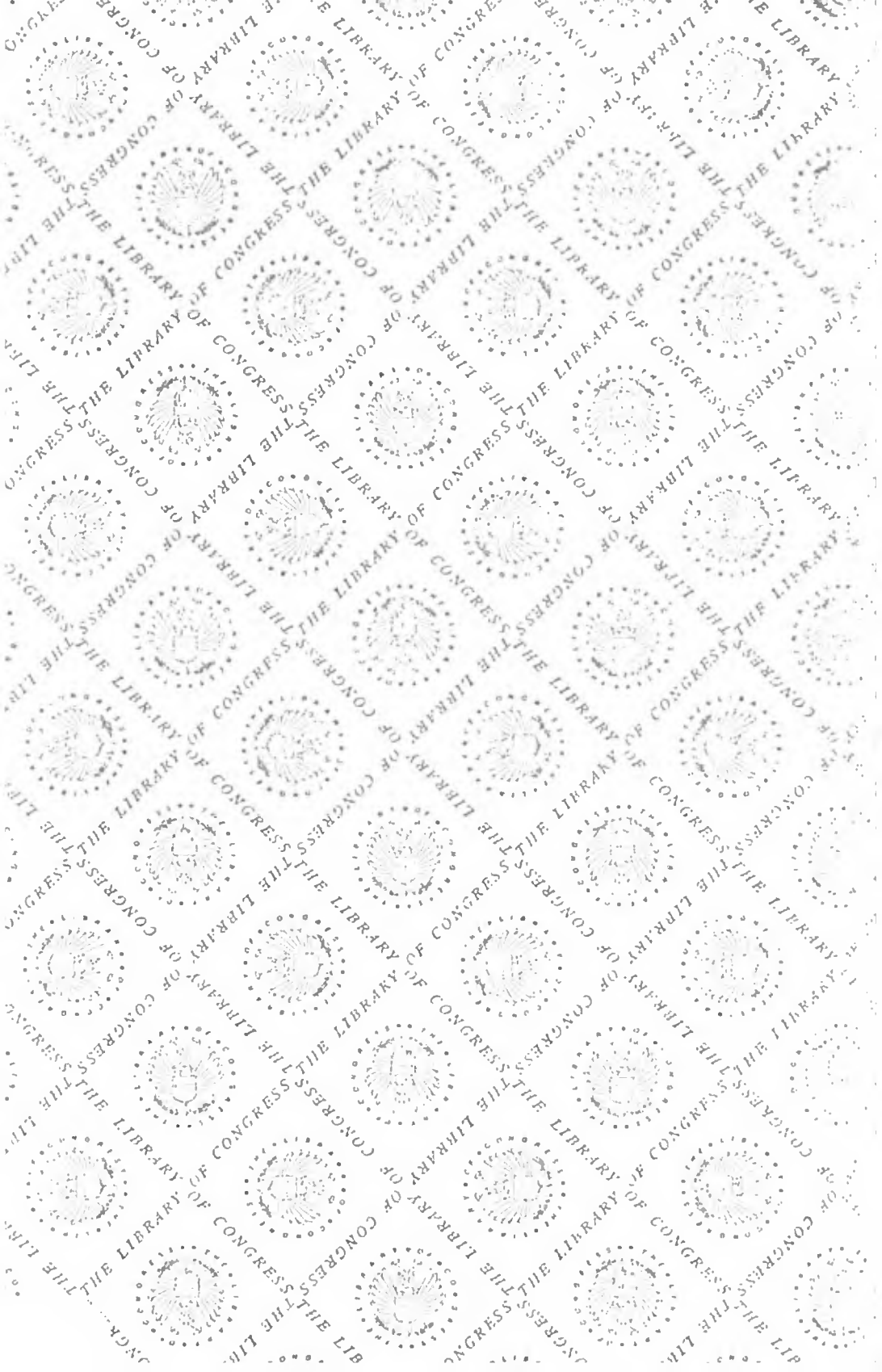
The Fourth Amendment requires that warrants issue "upon probable cause, supported by Oath or affirmation." The significance of the oath requirement is "that someone must take the responsibility for the facts alleged, giving rise to the probable cause for the issuance of a warrant." *United States ex rel. Pugh v. Pate*, 401 F.2d 6 (7th Cir. 1968); See also *Frazier v. Roberts*, 441 F.2d 1224 (8th Cir. 1971). This is accomplished under the procedure required by subdivision (c) (2); the need for an oath under the Fourth Amendment does not "require a face to face confrontation between the magistrate and the affiant." *People v. Chavaz*, 27 Cal. App. 3d 883, 104 Cal. Rptr. 247 (1972). See also *People v. Aguirre*, 26 Cal. App. 3d 7, 103 Cal. Rptr. 153 (1972), noting it is unnecessary that "oral statements [be] taken in the physical presence of the magistrate."

The availability of the procedure authorized by subdivision (c) (2) will minimize the necessity of federal law enforcement officers engaging in other practices which, at least on occasion, might threaten to a greater extent those values protected by the Fourth Amendment. Although it is permissible for an officer in the field to relay his information by radio or telephone to another officer who has more ready access to a magistrate and who will thus act as the affiant, *Lopez v. United States*, 370 F.2d 8 (5th Cir. 1966); *State v. Banks*,

pared and submitted by each district court before July 1, 1976. 18 U.S.C. § 3165(e)(1).

That part of rule 50(b) which sets out the necessary contents of district plans has been deleted, as the somewhat different contents of the plans required by the Act are enumerated in 18 U.S.C. § 3166. That part of rule 50(b) which describes the manner in which district plans are to be submitted, reviewed, modified and reported upon has also been deleted, for these provisions now appear in 18 U.S.C. § 3165(c) and (d).







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